

WEST VIRGINIA HIGHLANDS CONSERVANCY ET AL.

IBLA 95-557

Decided April 25, 2000

Appeal from an informal review decision of the Assistant Director, Field Operations, Office of Surface Mining Reclamation and Enforcement, affirming determinations not to issue 10-day notices to the State of West Virginia in response to allegations contained in four citizens' complaints requesting inspection and enforcement at specifically identified sites. (OSM 95-17.)

Affirmed in part; reversed and remanded in part.

1. Surface Mining Control and Reclamation Act of 1977: Generally--Surface Mining Control and Reclamation Act of 1977: Enforcement Procedures: Generally--Surface Mining Control and Reclamation Act of 1977: Citizen's Complaint--Surface Mining Control and Reclamation Act of 1977: Inspections: 10-Day Notice to State

Under 30 C.F.R. ' 842.11(b)(1)(i), OSM has "reason to believe" that a violation exists if the facts alleged by an informant in a citizen's complaint would, if true, constitute a violation of SMCRA, Departmental regulations at 30 C.F.R. ch. VII, the applicable State program, or "any condition of a permit or exploration approval." Once a citizen's complaint gives OSM reason to believe that a violation has occurred, OSM's obligation is to respond to the citizen's complaint by issuing a 10-day notice to the State. Neither OSM's perception of the "complexity" of the issues or the desire to conduct "policy review and outreach" justifies a refusal to address the site-specific allegations of violations in a citizen's complaint.

2. Administrative Appeals--Administrative Authority: Generally--Administrative Procedure: Decisions--Board of Land Appeals--Rules of Practice: Appeals: Effect of--Surface Mining Control and Reclamation Act of 1977: Generally

When an appeal is taken from an OSM decision, that office loses jurisdiction over the matter until

jurisdiction is restored by final disposition of the appeal by the appellate body. When, subsequent to an appeal, OSM renders additional conclusions, the Board would normally remand the matter to OSM to recover jurisdiction and properly adopt and render those conclusions. However, where the record in an appeal already contains a clear statement by OSM of its conclusions on each site-specific issue, as well as full briefing by the parties, no purpose would be served by remanding the matter and the Board may exercise its de novo authority to consider whether OSM's conclusions should be adopted.

3. Surface Mining Control and Reclamation Act of 1977: Generally--Surface Mining Control and Reclamation Act of 1977: Enforcement Procedures: Generally--Surface Mining Control and Reclamation Act of 1977: Citizen's Complaint--Surface Mining Control and Reclamation Act of 1977: Inspections: 10-Day Notice to State

The mere fact that individuals have self-reported data showing noncompliance with effluent limitations is not "reason to believe" a violation exists, because under the self-reporting regulations at 30 C.F.R. ' ' 816.41(e)(2) and 817.41(e)(2), the company bears an obligation to correct the effluent discharge to meet its hydrologic plan. It is not until this obligation to correct is ignored that OSM has "reason to believe" that a violation exists. But where a citizen provides evidence of consistent and repeated monthly reports from the same discharge point, OSM has "reason to believe" that a violation exists and is required to issue a 10-day notice to the State agency.

4. Surface Mining Control and Reclamation Act of 1977: Generally--Surface Mining Control and Reclamation Act of 1977: Enforcement Procedures: Generally--Surface Mining Control and Reclamation Act of 1977: Citizen's Complaint--Surface Mining Control and Reclamation Act of 1977: Inspections: 10-Day Notice to State

Failure to obtain an NPDES permit from the State or Federal authority responsible for implementation of the Clean Water Act is an enforceable violation of Federal and State SMCRA program rules, and a

citizen's complaint alleging that a permittee is operating a point source discharge without an NPDES permit would constitute "reason to believe" a violation of those rules exists.

5. Surface Mining Control and Reclamation Act of 1977: Generally--Surface Mining Control and Reclamation Act of 1977: Bonds: Generally--Surface Mining Control and Reclamation Act of 1977: Enforcement Procedures: Generally--Surface Mining Control and Reclamation Act of 1977: Citizen's Complaint--Surface Mining Control and Reclamation Act of 1977: Inspections: 10-Day Notice to State--Surface Mining Control and Reclamation Act of 1977: Performance Bond or Deposit: Forfeiture

The forfeiture of a bond does not provide a sufficient basis for OSM to decline to issue a 10-day notice to the State when a citizen has provided reason to believe that violations continue at a minesite.

6. Surface Mining Control and Reclamation Act of 1977: Generally--Surface Mining Control and Reclamation Act of 1977: Bonds: Generally--Surface Mining Control and Reclamation Act of 1977: Enforcement Procedures: Generally--Surface Mining Control and Reclamation Act of 1977: Citizen's Complaint--Surface Mining Control and Reclamation Act of 1977: Inspections: 10-Day Notice to State

Because a bond can be released only when all reclamation requirements are fully met, an allegation that a company with a released bond failed to retain an NPDES permit would not, standing alone, constitute "reason to believe" a violation exists.

7. Surface Mining Control and Reclamation Act of 1977: Generally--Surface Mining Control and Reclamation Act of 1977: Citizen's Complaint--Surface Mining Control and Reclamation Act of 1977: Enforcement Procedures: Generally--Surface Mining Control and Reclamation Act of 1977: Inspections: 10-Day Notice to State

When a citizen files a complaint that a State regulatory authority as a general matter is failing to carry out the "complete inspection" requirements of its program by failing to inspect every outfall for

illegal discharges, that particular grievance is cognizable under the Federal takeover regulations at 30 C.F.R. ' 733.12 and would thus be beyond this Board's jurisdiction.

8. Surface Mining Control and Reclamation Act of 1977: Generally--Surface Mining Control and Reclamation Act of 1977: Citizen's Complaint--Surface Mining Control and Reclamation Act of 1977: Enforcement Procedures: Generally

When a surface coal mining operation owned or controlled by an applicant for a permit is currently in violation of its permit, the surface mining laws, or other laws (including those pertaining to air or water environmental protection), section 510(c) of SMCRA dictates that the requested permit shall not be issued until the applicant submits proof that such violation has been corrected or is in the process of being corrected. Violations of the Clean Water Act justify blocking issuance of new permits.

9. Surface Mining Control and Reclamation Act of 1977: Generally--Surface Mining Control and Reclamation Act of 1977: Citizen's Complaint--Surface Mining Control and Reclamation Act of 1977: Enforcement Procedures: Generally--Surface Mining Control and Reclamation Act of 1977: Inspections: 10-Day Notice to State

When a citizen provides OSM with data from a State NPDES authority that a permittee is violating the Clean Water Act, OSM may not decline to issue a 10-day notice because of unspecified "doubts" about the data. Under 30 C.F.R. ' 842.11(b), OSM has "reason to believe" a violation is occurring where the data, if true, would constitute a violation, and a 10-day notice must be issued to the State with respect to permittees alleged to be in violation. However, when a citizen files a complaint that a State regulatory authority as a general matter is failing to obtain permit blocks against operators who are in violation of the Clean Water Act, that particular grievance is cognizable under the Federal takeover regulations at 30 C.F.R. ' 733.12.

10. Surface Mining Control and Reclamation Act of 1977: Generally--Surface Mining Control and Reclamation Act of 1977: Citizen's Complaint--Surface Mining Control and Reclamation Act of 1977: Enforcement Procedures: Generally--Surface Mining Control and Reclamation Act of 1977: Inspections: 10-Day Notice to State

Section 521(a) of SMCRA, 30 U.S.C. ' 1271(a) (1994), states that if "the Secretary has reason to believe that any person is in violation of any requirement of this chapter," then enforcement will be taken according to its further provisions, and 30 C.F.R. ' 700.5 defines "person" as including "any agency, unit or instrumentality of Federal, State or local government." Where a citizen alleges that acid mine drainage is occurring at sites where the State has forfeited a permittee's bond, OSM's regulations provide no basis for excluding the allegation from the process established in 30 C.F.R. ' 842.11(b). However, OSM cannot treat the State as a permittee.

APPEARANCES: Walton D. Morris, Esq., Charlottesville, Virginia, for appellants West Virginia Highlands Conservancy and the National Wildlife Federation; Sandra M. Lieberman, Esq., Office of the Solicitor, U.S. Department of the Interior, Pittsburgh, Pennsylvania, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE HEMMER

Factual and Procedural Background

The West Virginia Highlands Conservancy (Conservancy) and the National Wildlife Federation (NWF), complainants and appellants herein, have appealed from an April 27, 1995, decision, issued pursuant to a request for informal review, by the Assistant Director, Field Operations, Office of Surface Mining Reclamation and Enforcement (OSM or the agency). The decision on informal review arises from OSM's disposition of four citizen's complaints, filed by the Conservancy and NWF on January 31, 1995, with the Charleston, West Virginia, Field Office (CHFO), OSM, and also served upon the West Virginia Department of Environmental Protection (WVDEP), pursuant to 30 C.F.R. ' 842.12(a). The four citizen's complaints constituted complainants' notice of intent to initiate civil action pursuant to 30 C.F.R. ' 700.13.

The complaints challenge WVDEP's implementation of the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act), 30 U.S.C. ' 1201-1328 (1994), under its program approved by OSM. In addition to these alleged violations by WVDEP of the requirements in its approved

State program, complainants allege that OSM had failed to adequately monitor West Virginia's approved program. The appeal results from OSM's allegedly improper response to the citizen's complaints.

The Four Citizen's Complaints

Complaint CC-95-110-01. The first citizen's complaint, denominated as CC-95-110-01 (Correspondence No. F-95-031-01), identified bond forfeiture sites previously permitted to three companies: Borgman Coal Company, under West Virginia Permit No. EM-32; ED-E Development Company, Inc., under West Virginia Permit No. S-10-81; and Valley Mining Company, under West Virginia Permit No. S-64-83. The complainants alleged that "after forfeiting the performance bond at each of the sites, the [WVDEP] * * * knowingly allowed each site to discharge effluent that fail[ed] to meet applicable effluent limitations and/or water quality standards." (Citizen's Complaint CC-95-110-01 at 1-2.)

Complainants requested the following relief

[that] OSM * * * issue ten-day notices to West Virginia regarding the violations at the Borgman, ED-E, and Valley Mining sites. If West Virginia fails to take timely, appropriate action to cause the violations at those sites to be corrected, OSM must conduct a federal inspection of the current status of the Borgman, ED-E, and Valley Mining sites. Upon verifying the * * * charges, OSM must notify West Virginia that it has reason to believe that violations of West Virginia's program result from the State's failure to enforce the program effectively. OSM must then hold a hearing on the matter within thirty days of the notice. If West Virginia persists in its current refusal to correct the effluent violations at the Borgman, ED-E, and Valley Mining sites, OSM must substitute federal enforcement of so much of the West Virginia program as may be necessary to remedy the situation.

(Citizen's Complaint CC-95-110-01 at 11.)

Complaint CC-95-110-02. The second citizen's complaint filed by the Conservancy and NWF, denominated CC-95-110-02 (Citizen Correspondence No. F-95-031-02), identified minesites permitted to Phillipi Development (Permit No. 0-113-83) and Martinka Coal Company (Permit Nos. EM-125, R-746, R-747, 0-1001-87), as well as 22 permits issued to 15 additional companies, and asserted that there was "reason to believe" within the meaning of 30 C.F.R. ' 842.11(b)(2)

that even though the identified sites have chronic acid mine drainage and require treatment in order to meet applicable effluent and water quality standards, [West Virginia] has

failed to require that either the site-specific bonds and/or the Special Reclamation fund be adjusted to cover long-term treatment costs in the event of forfeiture.

(Citizen's Complaint CC-95-110-02 at 2.) 1/ The complainants requested the following relief:

OSM should find as to each of the identified mines that the permittee is in violation of the applicable provisions of the approved state program, the federal regulations, and the Act and take the required action under Section 521(a) to compel compliance by requiring the permittee to adjust the bond to cover such costs in the event of forfeiture. In the event that OSM determines that adjustment of the site-specific bond to the current statutory maximum is inadequate or not required, OSM should find that the Special Reclamation Fund contains insufficient funds to provide for such treatment pursuant to 30 C.F.R. 733.12(b). Accordingly, OSM should find "reason to believe" that the State is not effectively implementing, administering, maintaining or enforcing the permitting and bonding provisions of the approved state program, and notify West Virginia of this finding as required by 30 C.F.R. 733.12(b).

(Citizen's Complaint CC-95-110-02 at 10-11 (footnotes omitted).)

Complaint CC-95-110-05. The third citizen's complaint, denominated CC-95-110-05 (Correspondence No. F-95-031-05), alleged that the State of West Virginia was failing to block issuance of permits to companies for violations of the Clean Water Act (CWA), 33 U.S.C. ' ' 1251-1387 (1994), and implementing regulations. In support of these assertions, complainants identified one permittee, Elk River Sewell, which allegedly had forfeited five bonds and was purportedly responsible for five minesites with both daily discharges and monthly average discharges in violation of the CWA and was charged with "Outstanding Unabated Administrative Orders or Other Significant Non-Compliance." (Citizen's Complaint CC-95-110-05 at 10.) Complainants also identified nine permittees on minesites which allegedly had "both daily and monthly average discharges in violation of the CWA." (Citizen's Complaint CC-95-110-05 at 10-11.) 2/ Additionally, complainants listed and discussed eight permittees on eleven sites with allegedly

1/ The complaint cites 22 additional permittees by name, mining permit numbers, and National Pollutant Discharge Elimination System (NPDES) permit numbers and asserts that West Virginia "has failed to adjust the bond in [these] cases to cover such [water treatment] costs in the event of forfeiture." Id. at 9.

2/ Appellants state that no administrative orders existed for these minesites "because the permittee[s] failed to file the required monthly reports identifying the violations. State records show beyond dispute that there are continuing violations of the CWA." Id. at 10.

outstanding or unabated CWA Administrative Orders or Penalty Notices or which had been referred to the Environmental Protection Agency (EPA) or to the West Virginia Attorney General "for Judicial Enforcement of Outstanding Monthly Average Violations." (Citizen's Complaint CC-95-110-05 at 11-13.)

Complainants also alleged that eleven listed permittees failed to disclose outstanding violations of the CWA in applications for permits filed subsequent to receiving notice of those violations. *Id.* at 14-18. These omissions, complainants asserted, were inconsistent with the regulations at 30 C.F.R. ' ' 778.14(c) and 773.15, which, when read together, require that permit applicants provide information regarding notices received by them during the three-year period preceding the application date of the violation of any "Federal or State law, rule, or regulation pertaining to air or water environmental protection" in connection with a surface mining operation. (Citizen's Complaint CC-95-110-05 at 15.)

Complainants' citizen's complaint CC-95-110-05 concludes with the following requests for relief:

OSM [should] conduct a federal inspection of the permits identified in this complaint to verify whether outstanding violations of the Clean Water Act exist at the identified sites. Upon verifying the * * * charges, OSM should "permit block" the entity based on the unabated CWA violation(s), and take action under 30 C.F.R. ' 843.21 to rescind all permits which West Virginia has improvidently granted to the permittee and/or its affiliates unless and until the permittee either abates the violation or, at a minimum, enters into [an] appropriate abatement plan.

OSM should also take enforcement action against the identified permittees for failure to list unabated CWA violations in their permit applications as required by law.

* * * OSM should initiate proceedings under Section 30 C.F.R. ' 733.12(b).

Finally, OSM should take whatever other action is necessary to bring the state into full compliance with the Act, implementing regulations, and approved state program.

(Citizen's Complaint CC-95-110-05 at 21-22.)

Complaint CC-95-110-06. The fourth citizen's complaint filed on January 31, 1995 (Correspondence No. F-95-031-06), alleged a general systemic failure of the State of West Virginia to enforce hydrologic requirements of the State's approved program. Complainants alleged the following six failures:

First, inspectors do not sample (or show no flow at) the 16,000 permitted point source [discharges] in West Virginia each quarter as part of a complete inspection, even where

monitoring records submitted by the permittee show violations at a given outfall. Second, of those point sources sampled, the inspectors, without notable exception, sample only for compliance with the "daily maximum" effluent limitation standards, and do not perform the required sampling to determine compliance with the "monthly average" standard. Third, when quarterly monitoring reports submitted by the permittee pursuant to the requirements of the approved program reveal violations of the average monthly standard, the inspectors neither cite the violations based upon the reports filed by the permittees, nor conduct the necessary follow-up inspections to take enforcement action.

Fourth, inspectors do not take the required enforcement action when a surface coal mining and reclamation operation has one or more point source discharges but no valid NPDES permit. Fifth, in many cases, inspectors fail to determine whether the permittee has filed the required monthly monitoring reports, and take enforcement action when such reports have not been filed. Sixth and last, inspectors do not enforce the requirement of the approved program that permittee[s] take "immediate" action to correct violation(s) identified in the required quarterly reports.

(Citizen's Complaint CC-95-110-06 at 3.)

The complainants alleged that the State of West Virginia did not enforce the monthly average effluent limitations set by the EPA, compliance with which is required by the State's approved program. They identified eleven permittees who operated mines which were allegedly in violation of the average 30-day effluent limitation standard and against whom the State of West Virginia had not taken enforcement action. Id. at 8-13. Complainants identified the source of this alleged failure as "the failure of the State to conduct adequate and complete inspections as required by law." Id. at 13.

Complainants also alleged that the State of West Virginia failed to conduct complete inspections as required by law, in that the inspections which do take place allegedly are not conducted quarterly and do not include inspections of all permitted point source discharges (outfalls) as a part of a required quarterly inspection of surface coal mining and reclamation operations. The Conservancy and NWF identified 15 permittees whose mines were allegedly not given quarterly inspections and at which all outfalls were not inspected. Id. at 16-18.

Complainants alleged that the State of West Virginia "consistently and repeatedly fails to take enforcement action after a permittee has reported under oath that monthly average violations of effluent limitations have occurred," or after an administrative order is issued by the State authority responsible for water quality enforcement (the "NPDES

authority"). 3/ (Citizen's Complaint CC-95-110-06 at 18-19.) Complainants identified minesites of nine permittees and alleged that required inspections and enforcement actions were not conducted at those sites "after the state had reason to believe that violations of the effluent limitations existed" because of the issuance of an administrative order by the NPDES authority. Id. at 19-20.

Complainants alleged that some permittees possess valid State mining permits and one or more point source discharges, but do not possess the NPDES permits required under the State program. Id. at 21-22. They alleged that the State's record keeping system prevents ascertaining whether a given permittee has an NPDES permit and they described their own difficulties in searching through the State's filing system. Id. at 23-24 and n.33. 4/

Further, complainants listed eight permittees, operating under 13 permits, which allegedly failed to file required quarterly water monitoring reports but were not subject to State enforcement action. (Citizen's Complaint CC-95-110-06 at 26-27.) Finally, complainants identified ten permittees who allegedly failed to report effluent violations within five days of testing, as required under section 14.7(a) of Title 38 of the West Virginia approved program, and failed to "'immediately' implement remedial measures identified in the hydrologic reclamation plan required by" the approved State program. Id. at 27-29.

In addition to the alleged violations by the permittees and allegations of failure of WVDEP to enforce the requirements of its approved State program, complainants alleged that OSM had failed to adequately monitor West Virginia's approved program. Complainants alleged that OSM has "reason to believe" that West Virginia is failing to enforce the program in an effective manner, and that SMCRA section 517(b) imposes a series of steps on OSM in such cases, up to imposing Federal control. (Citizen's Complaint CC-95-110-06 at 30-32.)

Finally, complainants asserted that OSM must conduct oversight inspections of randomly selected West Virginia mining operations pursuant to section 517(b). (Citizen's Complaint CC-95-110-06 at 33-35.) Complainants identified 26 minesites at which OSM claimed to have conducted "complete" inspections but allegedly "did not inspect for monthly average violations, did not determine whether the mine was monitoring and reporting discharges as required by the approved state program, and did not inspect all permitted outfalls." Id. at 35-36.

3/ The NPDES authority refers to the State agency operating under a program approved by the EPA and responsible for issuance and compliance with permits for point source discharges under the NPDES established by the CWA.

4/ Complainants also include a list of ten permittees and their various mining and NPDES permits, some of which are listed as "unknown," id. at 22, but do not further elaborate on the significance of this list.

The Conservancy and NWF requested the following remedies, "pursuant to 30 C.F.R. 842.14":

that OSM immediately institute the necessary actions to ensure that each "complete" oversight inspection and each "partial" oversight or citizens' complaint inspection which includes review of a surface coal mining and reclamation operation's hydrologic protection efforts will include, without exception:

- * whether the operation has a valid NPDES permit;
- * whether the operation has filed all required monitoring reports;
- * whether the state has cited under the approved program any failure by the operation to submit all required NPDES monitoring reports, and if not, appropriate federal action either to notify the state of the deficiency or to cite the operation directly, as the circumstances merit;
- * whether the state has cited, or at a minimum, inspected each effluent limitation violation reported by the operation in its NPDES monitoring reports, and if not, appropriate federal action either to notify the state of the deficiency or to cite the operation directly, as the circumstances merit;
- * sampling of effluent at each NPDES outfall that is discharging at the time of complete inspection; and
- * re-inspection of the site at least once within 30 days after the initial site visit during the inspection for the purpose of sampling effluent at each NPDES outfall to determine compliance with applicable monthly average effluent limitations.

(Citizen's Complaint CC-95-110-06 at 36-37.)

OSM Response to Citizen's Complaints

By letter dated February 17, 1995, the Director of the CHFO, OSM, acknowledged receipt of complainants' four filings of January 31, 1995, and stated:

These four citizen complaint packages raise numerous complex policy and legal issues of major significance such as the extent that West Virginia (and/or the Office of Surface

Mining Reclamation and Enforcement (OSM)) may be obligated to enforce several aspects of the Federal Clean Water Act (CWA) and its implementing regulations as part of its regulatory program delegated under the Surface Mining Control and Reclamation Act of 1977. The issues you have raised may also be of national significance.

When a citizen presents allegations in a citizens complaint that, if true, would constitute a violation of the Act or the approved State program in a primacy state, under paragraph 842.11(b)(2), this constitutes "reason to believe" that a violation exists. The complaint should then be forwarded to the State regulatory authority via a Ten-Day-Notice (TDN). However, the obligation to forward the complaint to the state via a TDN does not arise if the allegations would not, even if true, meet the standard of paragraph 842.11(b)(1)(i).

In accordance with paragraph 842.12(d), I am hereby notifying you that to review the information provided in the above four complaints will require additional time and, therefore, the numerous Federal inspections you requested have not been conducted. This Office is still in the process of analyzing whether or not the numerous complex allegations you have made would constitute violations triggering the need for a TDN to the State of West Virginia under paragraph 842.11. I understand that you have indicated to OSM that you agree that the several complex issues raised may take some time to analyze. Upon completion of this evaluation, we will notify you of what action, if any, we will take in response to each allegation you have made in the four citizen complaint packages referenced above.

(Letter dated February 17, 1995, to L. Thomas Galloway, from Director, CHFO, OSM, at 2.)

The CHFO Director stated that this letter of February 17, 1995, did not constitute a final decision and that complainants could request informal review of the interim decision, pursuant to 30 C.F.R. ' 842.15. The CHFO Director advised the complainants to address this letter to Allen D. Klein, Assistant Director for Field Operations, OSM, in Washington, D.C. (Letter dated February 17, 1995, at 2.)

Complainants' Request for Informal Review

By letter dated February 21, 1995, counsel for complainants responded to the OSM letter of February 17, 1995, and requested informal review. Complainants asserted that the CHFO

is correct that the four complaints raise numerous issues of national significance. The complaints are almost certainly the most important and most comprehensive ever filed in the

17-year history of the Act. The four complaints document beyond reasonable dispute, a major breakdown in the administration of the hydrologic protection provisions of the state's approved program, a breakdown, as OSM is well aware, that is not limited to West Virginia.

(Letter of February 21, 1995, to Allen D. Klein at 2.)

By letter also dated February 21, 1995, and addressed to Robert Uram, Director, OSM, counsel for complainants proposed two alternative approaches to handling the citizen's complaints. Complainants identified the first approach as one of negotiation, in which they proposed a series of terms in return for not seeking to enforce "the prompt processing of the citizen complaints." (Letter addressed to Robert Uram, dated February 21, 1995, at 2, attachment.) The Conservancy and NWF identified their second proposed alternative as "simply to follow the regulations with no waivers by the Complainants." Id. at 3.

Complainants went on to assert that the second alternative was "seriously off track" because, in OSM's February 17, 1995, response to complainants' January 31, 1995, filing, it had asserted that complainants had failed to allege

any facts which, if true, would constitute a violation of the Act, implementing regulations, or approved state program at any mine in the State of West Virginia. * * * Accordingly, according to the February 17th communication, OSM is under no obligation to issue a single ten-day notice * * * [and] under no regulatory time limit * * * [to] address the issues raised by Complainants * * *.

(Letter addressed to Robert Uram, dated February 21, 1995, at 3.)

By letter to OSM Assistant Director Allen D. Klein dated February 24, 1995, complainants argued that "there [was] no basis whatsoever for the conclusion of CHFO that complainants have failed to allege facts which if true would constitute a 'violation'." ^{5/} In this letter, they sought an informal review decision "without regard to the execution of a comprehensive procedural agreement." (Letter from Galloway to Klein, Assistant Director, OSM, dated February 24, 1995, at 3.)

^{5/} Complainants stated that it was "unconscionable that an agency is allowed to act so irresponsibly and force citizens to expend time and effort seeking reversal of such baseless actions. * * * Accordingly, Complainants seek an award of fees and expenses as authorized under section 525(e) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1275(e)." (Letter from Galloway to Klein, dated Feb. 24, 1995, at 3 and n.1.)

By letter dated March 9, 1995, the Acting Assistant Director, Eastern Support Center (ESC), OSM, responded to complainants' February 21, 1995, letter and asserted that "OSM is working expeditiously on the issues raised" by the Conservancy and NWF. (Letter dated March 9, 1995, from Acting Assistant Director, ESC, OSM, to Galloway, at 1.) The Acting Assistant Director also stated that "[f]our teams of OSM personnel were formed to act on the issues" and he described the teams as follows:

An Allegation Verification Team is verifying the factual accuracy of the allegations raised in the NWF and WHC notice of intent to sue.

A Policy Team is confirming and clarifying OSM/State responsibilities under CWA on a national scale and as these responsibilities specifically relate to the approved West Virginia regulatory program.

A Citizen Complaint Team will address the individual citizen complaints attached to the notice of intent to sue. Once the policy team completes its assignment, the Citizen Complaint Team will act on these complaints quickly and according to SMCRA, the Federal regulations, and OSM directives.

A National Survey Team is determining how OSM/States throughout the nation are addressing the CWA requirements and other issues raised. While this information is not required by the notice of intent to sue, we intend to use this information as the first step to determine what corrective actions may be necessary in other Field Offices and States.

(Letter dated March 9, 1995, from Acting Assistant Director, ESC, OSM, to Galloway at 1, 2.)

By letter dated April 18, 1995, CHFO apprised complainants that, pursuant to their four citizen's complaints, OSM had issued Ten-Day Notice (TDN) No. X-95-110-420-001 TV7 to the State of West Virginia identifying seven permittees that had failed to submit surface water monitoring reports in accordance with their approved surface water monitoring plans. Additionally, the April 18, 1995, letter notified complainants that CHFO had issued TDN No. X-95-110-420-002 TV8 to the State of West Virginia identifying eight occurrences involving seven permittees that had failed to report violations of effluent limitations within five days of receipt of analytical results. Copies of the TDN's were enclosed with the letter. (Letter dated April 18, 1995, to Galloway from Director, Charleston Field Office, OSM.)

By separate letter also dated April 18, 1995, the Acting Assistant Director, ESC, OSM, informed complainants that OSM had completed its initial review of the allegations raised in the four citizen's complaints.

The Acting Assistant Director's letter referenced the above two TDN's. (Letter dated April 18, 1995, to L. Thomas Galloway and Walton D. Morris from Acting Assistant Director, ESC, OSM, at 2.) The letter provided a status report on OSM's intended course of action in response to the remainder of complainants' allegations. The status report states, in pertinent part:

Most of your allegations pertain to enforcement of the Clean Water Act under the West Virginia surface mining regulatory program approved pursuant to [SMCRA]. While the [Notice of Intent to Initiate Civil Action] focuses on the State's alleged failure to enforce its approved program, the underlying issues have significant implications for other State and Federal regulatory programs. For this reason, OSM found it necessary to first examine the corresponding Federal requirements, the standards against which all state programs are measured.

The review entailed a comprehensive undertaking, involving four teams of OSM personnel. Among other things, the teams studied the language of relevant statutory and regulatory provisions, searched the legislative history of SMCRA and rule preambles for guidance, consulted with the Environmental Protection Agency regarding interpretation and enforcement of the Clean Water Act, and conducted fact-finding to assess the accuracy of the allegations. Throughout this effort, OSM has operated in good faith to address the allegations seriously and deliberatively. Several draft team reports have been written.

A summary of the tentative policy positions is enclosed.

OSM now intends to circulate the team's tentative policy determinations to all interested parties and solicit their opinions. Adoption of many positions asserted by NWF and the [Conservancy] would be a departure from the agency's longstanding approach to these issues. Therefore, the agency must involve all interested parties in the evaluation of the appropriateness of the proposed policies.

Until OSM, in consultation with other interested parties, has clarified the appropriate standard against which to measure the State's actions, it is premature for the agency to evaluate the performance of West Virginia or any other State regulatory authority with respect to enforcement of the Clean Water Act requirements. The agency believes that it would be neither appropriate nor equitable to take action at this time against West Virginia or any other State for implementing its program in a manner consistent with longstanding OSM policy.

(Letter dated April 18, 1995, to Galloway and Morris from Acting Assistant Director, ESC, OSM, at 1-2.)

The Acting Assistant Director's letter also stated that

[i]ssues regarding the adequacy of site-specific bonds and the Special Reclamation Fund (citizen complaint concerning Philippi Development and Martinka Coal Company) and acid mine drainage treatment at bond forfeiture sites (citizen complaint concerning Borgman Coal Company, et al.) are being addressed in the context of OSM's review of a pending amendment to the West Virginia program. As expressed to you in the February 17, 1995 letter from CHFO, OSM intends to defer action on the remaining allegations in the citizen complaints until final policy positions are reached.

Id. at 3.

Attached to this April 18 letter was a document entitled "Summary of Tentative Policies on Issues Raised in the National Wildlife Federation and West Virginia Highland[s] Conservancy Notice of Intent to Sue." In it, OSM stated the following "General Conclusions":

After analyzing OSM regulations and related materials, the policy team has tentatively determined that the SMCRA regulatory authority has an obligation to:

Enforce all effluent limitations established in the NPDES permit pursuant to 40 CFR Part 434, including the monthly average standards.

When approving new permits or permit revisions, either (1) ensure that the applicant has obtained an NPDES permit or other authorization from the NPDES permitting authority for all proposed point-source discharges, or (2) include a condition in the permit or revision approval document that requires the permittee to obtain an NPDES permit or other authorization prior to creation of a point-source discharge.

As part of a complete inspection of an operation with a point-source discharge, verify that (1) a valid NPDES permit is in place, (2) an application for renewal has been properly filed with the NPDES permitting authority, or (3) the NPDES permitting authority has otherwise authorized the discharge.

To the extent that the regulatory authority is aware that a permit applicant, anyone owned or controlled by the permit applicant, or anyone who owns or controls the permit applicant is responsible for an unabated NPDES violation, require

submission of proof that the violation either has been or is in the process of being corrected to the satisfaction of the NPDES permitting authority as a prerequisite for issuance of the SMCRA permit.

Ensure that the surface water monitoring plan approved under SMCRA is adequate to monitor compliance with all effluent limitations set forth in 40 CFR Part 434 and consistent with point-source discharge monitoring requirements established by the NPDES permitting authority.

The OSM policy team has also affirmed a regulatory authority's obligation to:

Take enforcement action whenever a permittee fails to comply with the approved SMCRA surface water monitoring plan, including failure to submit monitoring reports or promptly notify the regulatory authority of any "noncompliance with the permit conditions."

OSM does not agree with the complainants' allegations that the regulatory authority has an obligation to sample and analyze each point-source discharge (outfall) as part of a complete inspection if there are other means of monitoring compliance. OSM also does not agree with the complainants' argument that OSM must inspect and sample all outfalls whenever it conducts an oversight inspection for the purpose of evaluating the operation's compliance with performance standards relating to water quality.

(Enclosure in Letter dated April 18, 1995, from Acting Assistant Director, ESC, OSM, to Galloway and Morris at 1-2.)

OSM's Decision on Informal Review

By decision dated April 27, 1995, the Assistant Director, Field Operations, OSM, responded to appellants' request for informal review, stating in pertinent part:

We agree with [CHFO] that the citizen complaints raise complex issues of major significance with respect to national policy on the implementation and enforcement of the Clean Water Act by OSM and the states acting as regulatory authorities under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act). As you know, OSM has completed its initial review of these issues and has developed tentative policy

determinations that will be circulated to the states and other interested parties for consultation. A summary of those tentative policy positions was provided to you along with the ESC's letter of April 18, 1995. Adoption of some of these policy positions would be a departure from OSM's previous approach to those issues. Further, U.S. EPA has not yet provided OSM with EPA's official position as to what constitutes an unabated violation of the Clean Water Act for purposes of the permit issuance regulations at 30 CFR ' 773.15(b).

Under these circumstances, it would not be appropriate or equitable to initiate the inspection or enforcement process at this time regarding the specific sites you identify in your complaints * * *. The obligation to forward the complaints alleging such violations to the state via TDN has not yet arisen because OSM cannot conclude that "reason to believe" exists in those cases until OSM has completed the policy review and outreach process described in the ESC letter of April 18th. * * * [T]hat process is expected to take 180 days to complete.

Accordingly, I find that the Field Office acted correctly * * * [and] your requests for inspection and enforcement at the specific sites you identified in your citizen complaints as part of the informal review process are not granted at this time, pending completion of OSM's policy review and outreach process outlined in the ESC letter of April 18, 1995.

(Decision on Informal Review, dated April 27, 1995.) 6/

Complainants were advised of their right to appeal. Nonetheless, the following issues were identified by OSM as not subject to appeal "because they do not constitute requests for Federal inspection within the coverage of 30 CFR ' ' 842.11 and 842.12, which would be appealable to OHA [Office of Hearings and Appeals] upon an informal review decision made pursuant to 30 CFR ' 842.15(d)":

(1) To the extent that your citizen complaints requested action by OSM, pursuant to 30 CFR part 733, with respect to West Virginia's implementation of its approved state program, the Field Office's interim response of February 17, 1995, did not address those portions of the complaints and neither does today's decision. Instead, the 30 CFR part 733 issues will be addressed incident to the review and outreach process outlined in the ESC letter of April 18, 1995.

6/ The letter excepted from this conclusion the TDN's that OSM had served on the State and was planning to serve on the State, as identified in the Letter dated Apr. 18, 1995, to Galloway and Morris from the Acting Assistant Director, ESC, OSM.

(2) Your informal review request also contains a challenge to the CHFO's failure to respond to your allegations pursuant to 30 CFR ' 842.14 that the Field Office is not performing complete and adequate oversight inspections. An alleged failure to address the completeness and adequacy of OSM's oversight inspections is not an issue subject to the informal review process of 30 CFR ' 842.15(d). Nevertheless, consistent with the ESC letter of April 18th, we provide the following response under 30 CFR ' 842.14.

OSM has reviewed this issue and does not agree that OSM inspectors must inspect and sample all outfalls whenever it conducts an oversight inspection for the purpose of evaluating the operation's compliance with performance standards relating to water quality. Section 517(a) of SMCRA requires the Secretary to conduct such inspections as "are necessary to evaluate the administration of approved State programs...." There is no mandate to conduct "complete" inspections as part of OSM's oversight of State program implementation.

As a matter of policy, OSM conducts both complete and partial oversight inspections. However, complete inspections are not intended to be duplicative of State complete inspections. Rather, OSM's oversight inspections focus on evaluating the State's methods and performance in assessing an operator's compliance. At some point in the oversight process, OSM will evaluate all aspects of the State's implementation of its approved program. However, this does not mean that each inspection will include a review of all the items listed by the complainants in the citizen complaints.

(Decision on Informal Review, dated April 27, 1995, at 3-4.)

Issues Raised on Appeal

On May 23, 1995, the Conservancy and NWF filed an appeal of the OSM April 27, 1995, decision on informal review. In their Statement of Reasons on Appeal (SOR), appellants state that OSM's informal review decision contains two major flaws:

First, OSM's failure to issue the ten-day notices required by the Surface Mining Act and the Secretary's regulations has the consequence of indefinitely delaying inspection and enforcement action at every site identified in the Appellants' four complaints. Nine months have now passed since the Appellants filed their four citizen complaints. * * * OSM has in fact totally ignored the citizen complaint response requirements of 30 U.S.C. ' 1271(a), and has instead granted itself unlimited time to decide what to do, if anything, about the

issues that the Appellants have raised. This Board should require OSM to follow the Secretary's regulations, issue the required ten-day notices on each issue that the Appellants' complaints raise, and then follow through on subsequent steps in the federal enforcement process.

Second, in formulating the informal review decision at issue in this appeal, OSM has violated this Board's requirement that informal review be conducted by a "neutral person" who is not "an immediate supervisor of the inspector whose actions are being reviewed." Hazel King, 96 IBLA 216, 236 (1987).

(SOR at 2-3 (emphasis added).)

The bulk of the SOR is devoted to the appellants' first alleged flaw. Appellants assert that OSM was bound by the citizen response provisions of SMCRA at 30 U.S.C. ' 1271(a) (1994), and the regulation at 30 C.F.R. ' 842.11(b)(1)(i)(B)(1) to issue TDN's to West Virginia for each of the violations alleged in appellants' citizen's complaints. Appellants argue that the regulations "do not afford OSM discretion to delay initial responses to citizen complaints if the complaints establish 'reason to believe' that a violation exists." (SOR at 14.) Citing 30 C.F.R. ' 842.11(b)(2), appellants argue that OSM cannot delay issuing TDN's in order to undertake an investigation. Rather, "[i]n evaluating whether a particular citizen complaint establishes 'reason to believe' that a violation exists, OSM must treat the allegations contained in the complaint as true." (SOR at 14.) The Conservancy and NWF further argue that

[u]nder the Secretary's regulations, factual investigation of a citizen complaint follows, rather than precedes, issuance of a ten-day notice to state regulators. Moreover, while the Secretary's regulations afford OSM substantially more time and discretion in deciding how to remedy systemic enforcement failures, see 30 C.F.R. Parts 732 and 733, they do not allow OSM to delay processing a site-specific citizen complaint while it considers the systemic implications the complaint may have.

(SOR at 15.)

Specifically, appellants request that the Board order OSM to issue, "without further delay," TDN's addressing the following violations of the West Virginia program:

- (1) failure of permittees to obtain or renew NPDES permits;
- (2) failure of permittees to perform the required monitoring of effluent discharges;
- (3) failure of permittees to report or correct violations of effluent limitations;

- (4) failure of state and federal regulatory agencies to take enforcement action for violations of the monthly average effluent standards;
- (5) failure of state regulators to inspect all outfalls as a part of each complete inspection required by the approved state program and the Surface Mining Act;
- (6) failure to block the issuance of new or significantly revised surface mining permits to entities linked to outstanding violations of the Clean Water Act;
- (7) failure to adjust site specific bonds and the State's special reclamation fund to cover the long term costs of chronic acid mine drainage;
- (8) failure of the State to treat acid mine drainage at sites where West Virginia has forfeited a permittee's bond.

(SOR at 52.) Appellants assert that the first five enumerated violations derive from appellants' "first" citizen's complaint. According to appellants, the sixth, seventh, and eighth alleged violations are found in the "second," "third," and "fourth" citizen's complaints, respectively. See SOR at 3-4. 7/ Appellants assert that each of these eight allegations in their citizen's complaints establishes "reason to believe" that serious violations of the SMCRA and the State program exist, and they request that this Board reverse OSM's decision on informal review and order OSM "to issue, without further delay, ten-day notices addressing each of the violations identified [in the citizen's complaints.]" (SOR at 52, 53.)

OSM's Responses

Counsel for OSM replied to appellants' SOR on February 20, 1996. Generally, OSM responds that its obligations to issue TDN's are tempered by the complexity of the complaints and the fact that they "raise numerous issues of national significance." (OSM Brief in Response to Statement of Reasons, February 20, 1996 (OSM Response to SOR), at 5.) OSM explains its response to its statutory obligations as follows:

OSM has not ignored the * * * citizen complaint response requirements at 30 U.S.C. '1271(a), as the petitioners claim, nor has OSM's purpose in conducting this review been to intentionally dodge obvious responsibilities by delaying issuance of TDNs. Rather, this extensive review was required because of the lack of precedent and the fact that there is little

7/ Appellants do not identify which of the four complaints they filed on the same date should be understood to be the "first."

guidance in the language of the Act, the regulations, or legislative history. In addition, many of the positions asserted by the petitioners present difficult implementation issues that OSM has been attempting to resolve. Finally, where OSM's review confirmed that certain allegations would constitute violations, TDN's were issued.

(OSM Response to SOR at 8.) Relying on the preamble to the final rule issued with respect to TDN's, OSM argues that it is permitted to refrain from taking enforcement action until a programmatic problem is solved. (OSM Response to SOR at 8-10, quoting 53 Fed. Reg. 26728-29 (July 14, 1988).)

In addition to its response to the general procedural issue, OSM responds with explanations as to why it did not perceive a need to issue TDN's with respect to the eight categories for which appellants demand them. (OSM Response to SOR at 10-23.) While each of these responses will be addressed individually in our analysis, below, OSM argued that most of the eight allegations specifically gave it no "reason to believe" a violation of the State program was taking place.^{8/} On two issues, OSM reserved judgment. On the question of whether to issue TDN's to companies for failure to obtain an NPDES permit, OSM reserved the right to supplement its Answer to indicate final disposition of appellants' allegations. (OSM Response to SOR at 16.) Likewise, on the question of enforcement of monthly average effluent limitations, OSM stated: "OSM will issue TDNs in response to the petitioners' allegations of monthly average effluent violations where the data provides reason to believe that such violations exist," but reserved the right to "supplement this answer to indicate the final disposition of these allegations." (OSM Response to SOR at 12.)

With respect to the second of appellants' alleged flaws, OSM asserts that Allen Klein's involvement in the informal review of appellants' citizen's complaints did not violate the neutrality rule in Hazel King, 96 IBLA 216, 236 (1987). (OSM Response to SOR at 23-24.) OSM asserts that appellants "have failed to show that Mr. Klein was biased in rendering the informal review decision." Id. at 24. OSM points out that it should be anticipated that all senior level OSM officials would be briefed on the nature of consolidated citizen's complaints of the breadth that appellants submitted, and that appellants' suggestion that such briefing should disqualify the senior official would deprive a complainant of informal review altogether. Id.

^{8/} Squaring the pleadings is difficult, because, while appellants identify eight issues for which it provided "reason to believe" a violation existed, OSM's response is premised on the existence of six allegations. OSM's response is not unreasonable, in that appellants appear to present argument with respect to the eight issues under six headings.

On September 24, 1997, OSM filed a Supplemental Brief in response to appellants' SOR. The Supplemental Brief conveyed OSM's final response to the two violation categories on which OSM had reserved judgment in its first Brief in Response. On those remaining two issues -- failure to have a valid NPDES permit and the enforcement of monthly average effluent limitations -- OSM concluded that appellants had not submitted information which provided "reason to believe" that violations existed and therefore that OSM was unable to issue TDN's. (OSM Supplemental Brief at 5-12.) Generally, OSM premised this conclusion on its assertion that it has no authority to enforce provisions of the CWA. *Id.* at 4-5. Specifically, OSM conducted analysis of appellants' submitted facts and concluded that (1) for the period May 1996 through March 1997, the relevant companies' self-reported violations were not significant, *id.* at 8-9, and (2) the companies which appellants had alleged had no NPDES permits also had forfeited their bonds; thus, any SMCRA permit that had been issued had expired or terminated and an NPDES permit was no longer required by SMCRA. *Id.* at 11.

Appellants' Response

On October 31, 1997, appellants filed a response to OSM's Supplemental Brief. 9/ Appellants generally restated their prior points (Appellants' Reply Brief at 9-32), but also alleged that OSM's supplemental response to the two issues was unreasonable because OSM had no authority to engage in a two-year delay in reaching its determination. *Id.* at 4-6. Additionally, appellants argued that they were unlawfully excluded from the fact-finding undertaken by OSM to assess the accuracy of the information presented in appellants' citizen's complaints. *Id.* at 6-9.

Analysis

As the history of this case shows, sorting through the issues, arguments, and requests for relief and contrasting the appeal with the relief appellants sought in their citizen's complaints, has been arduous and complicated. The four citizen's complaints comprise broad requests for OSM action ranging from site-specific relief, to general programmatic oversight of West Virginia program issues, to a takeover of the approved State program. The programmatic issues are not before us. All that is before this Board are the two broad procedural "flaws" asserted at pages 2-3 in the SOR -- whether OSM can delay site specific response pending review of broad programmatic issues and whether Klein's involvement was proper -- and the appellants' requests for relief in the form of TDN's with respect to the eight categories of violations identified in the SOR at 52-53.

On the side of appellants, they have compiled considerable and dramatic evidence of violations by SMCRA permittees in West Virginia and

9/ By Notice filed Oct. 7, 1996, Galloway withdrew as counsel for appellants.

broad problems (some admitted by OSM) with West Virginia's approved State program. They were clearly frustrated by OSM's assertedly ineffective response to their overwhelming efforts.

On the other side, we share OSM's frustration with the sheer amount, complexity, and lack of organization of the material presented. The four complaints comprise four inches of disorganized and unstructured material that is not indexed or divided by tables of contents, and which seeks scattershot relief. Even complainants concede that they have unloaded such a considerable amount of material on the agency that compliance with statutory and regulatory deadlines is not reasonably feasible. This Board's review has also been complicated by appellants' failure to identify specific citizen's complaints from which their arguments derive (other than by reference to "first," "second," "third," and "fourth," for complaints all filed the same day, and where these denominations do not correspond to ascending complaint numbers), or to provide any cross-reference or index of arguments from document to document.

We are troubled as well by the lack of connection between the relief sought in the appeal and the agenda presented by the citizen's complaints.

The complainants obviously sought a broader programmatic impact in their complaints than they seek in this appeal. No party has apprised the Board of the status of those programmatic issues except with respect to one matter. Even then, neither party's explanation of the impacts of that resolution is forthright. Nonetheless, we attempt below to address the two procedural issues raised by appellants, as well as a third that must be resolved in order to consider the questions involving the eight categories of violations. We proceed to address each category, though two of the eight were not separately argued by appellants.

This effort, too, raises another difficult issue. With respect to several of the categories of alleged violations for which appellants seek TDN's, appellants appear to assert that OSM should be issuing TDN's to the State SMCRA agency, WVDEP, in cases where appellants allege it committed a violation of the State program with respect to a permit site which is not itself alleged to be in violation of any relevant authority. This issue of first impression is lurking in several arguments in the SOR, but neither appellants nor OSM directly briefs its implications. To the extent these requests can be characterized as requests for programmatic review, as discussed below, those issues are properly treated as a request for an evaluation of a State program under 30 C.F.R. Part 733, and are not properly subject to this appeal.

I. Failure To Issue TDN's For Case Complexity and Existence of Programmatic Issues.

[1] We turn first to the broad procedural questions presented by the decision on informal review. Specifically, we review whether OSM's decision on informal review was correct in upholding CHFO's conclusion that OSM was not obligated to issue TDN's because appellants' citizen's complaints

raised "complex issues of major significance with respect to national policy on the implementation and enforcement of the Clean Water Act by OSM and the states acting as regulatory authorities under [SMCRA]." (April 27, 1995, Decision at 2.)

Section 521(a)(1) of SMCRA, 30 U.S.C. ' 1271(a)(1) (1994), sets forth OSM's responsibilities when it receives notice from a citizen of a possible violation:

Whenever, on the basis of any information available to him, including receipt of information from any person, the Secretary has reason to believe that any person is in violation of any requirement of this chapter or any permit condition required by this chapter, the Secretary shall notify the State regulatory authority, if one exists, in the State in which such violation exists. If * * * the State regulatory authority fails within ten days after notification to take appropriate action to cause said violation to be corrected or to show good cause for such failure and transmit notification of its action to the Secretary, the Secretary shall immediately order Federal inspection of the surface coal mining operation at which the alleged violation is occurring unless the information available to the Secretary is a result of a previous Federal inspection of such surface coal mining operation.

Departmental regulations implementing section 521(a)(1) provide that any person may request a Federal inspection of a surface mining operation permitted under an approved State program by furnishing a statement which gives an authorized representative of the Secretary "reason to believe that a violation, condition or practice referred to in [30 C.F.R.] ' 842.11(b)(1)(i) exists" and that the State regulatory authority has been notified, in writing, of the violation. 30 C.F.R. ' 842.12(a). This latter regulation describes the procedure for filing a citizen's complaint that requests a Federal inspection:

A person may request a Federal inspection under ' 842.11(b) by furnishing to an authorized representative of the Secretary a signed, written statement (or an oral report followed by a signed, written statement) giving the authorized representative reason to believe that a violation, condition or practice referred to in ' 842.11(b)(1)(i) exists and that the State regulatory authority, if any, has been notified, in writing, of the existence of the violation, condition or practice.

30 C.F.R. ' 842.12(a).

OSM regulations specify that the authorized representative has "reason to believe" a violation exists "if the facts alleged by the informant would, if true, constitute a * * * violation referred to in

paragraph (b)(1)(i) of this section." 30 C.F.R. ' 842.11(b)(1)(iii)(C)(2).

If an alleged violation is not an emergency, as defined in the regulations at 30 C.F.R. ' 842.11(b)(1)(i), OSM must notify the State of the "possible violation" and provide the State regulatory agency ten days within which to respond. 30 C.F.R. ' 842.11(b)(1)(ii)(B)(1). OSM must conduct an inspection if it issues this TDN to the State regulatory agency and the State fails to take appropriate action within ten days, or to show good cause for failure to do so. Id.

In promulgating the rules defining "reason to believe" an inspection should be conducted, OSM expressly contemplated and rejected limiting its obligation to inspect:

[A] commenter would substitute "alleged" for "possible" in ' 842.11(b)(1)(ii)(B) because the word "possible" triggers OSM's inspection authority on too speculative a basis and the word "alleged" more clearly reflects section 521(a) of the Act.

OSM disagrees. OSM is required to conduct an inspection when it has "reason to believe" that a violation exists. The basis for such a belief may or may not involve an affirmative allegation. Moreover, considering the broad language of section 521(a) of the Act, OSM inspections are necessarily "speculative" until it is determined whether or not a violation exists.

Another commenter stated that OSM must have probable cause to believe the informant's statements are true before acting under ' 842.11(b), and must specify in greater detail what "appropriate action" the State must take to preclude Federal action.

OSM disagrees. Section 842.11(b)(1)(i) requires the Secretary's authorized representative to have "reason to believe on the basis of information available to him or her" that a violation exists. This language is found in section 521(a)(1) of the Act and does not require OSM to conduct an inquiry into the veracity of the complainant. OSM also disagrees with the suggestion that "appropriate action" should be spelled out in greater detail. The crucial response of a State is to take whatever enforcement action is necessary to secure abatement of the violation.

* * * * *

[T]he Act does not require that a person be certain that a violation exists, but only that he have "reason to believe"

that one exists. The existing language, thus, reflects the intent of the Act, *i.e.*, that the Secretary inspect where the possibility of violations exists * * *.

47 Fed. Reg. 35627-28 (Aug. 16, 1982). See Donald St. Clair, 77 IBLA 283, 307, 90 I.D. 496, 509 (1983).

In sum, under 30 C.F.R. ' 842.11(b)(1)(i), OSM has "reason to believe" that a violation exists if the facts alleged by an informant in a citizen's complaint would, if true, constitute a violation of SMCRA, Departmental regulations at 30 C.F.R. ch. VII, the applicable State program, or "any condition of a permit or exploration approval." Once a citizen's complaint gives OSM reason to believe that a violation of SMCRA has occurred, OSM is required to notify the State regulatory authority. Plum Creek Mining Co., 142 IBLA 323, 328 (1998); Patricia A. Mehlhorn, 140 IBLA 156, 159 (1997); Robert L. Clewell, 123 IBLA 253, 259, 99 I.D. 100, 104 (1992). Neither the statute nor an implementing regulation gives OSM discretionary authority to do otherwise; the issuance of a TDN should be automatic in that case.

Without yet specifying which allegations might have constituted "reason to believe" a violation existed, the record before us gives ample evidence that some within OSM found reason to believe that appellants' assertions of possible violations, if true, would constitute violations pursuant to 30 C.F.R. ' 842.11(b)(1)(i). Attached to the letter dated April 18, 1995, to Galloway and Morris from Acting Assistant Director, ESC, OSM, was the document entitled "Summary of Tentative Policies on Issues Raised in the National Wildlife Federation and West Virginia Highland[s] Conservancy Notice of Intent to Sue." The ESC letter thus documented to appellants the "General Conclusions" that the SMCRA regulatory authority does have an obligation to:

Enforce all effluent limitations established in the NPDES permit pursuant to 40 CFR Part 434, including the monthly average standards.

When approving new permits or permit revisions, either (1) ensure that the applicant has obtained an NPDES permit or other authorization from the NPDES permitting authority for all proposed point-source discharges, or (2) include a condition in the permit or revision approval document that requires the permittee to obtain an NPDES permit or other authorization prior to creation of a point-source discharge.

As part of a complete inspection of an operation with a point-source discharge, verify that (1) a valid NPDES permit is in place, (2) an application for renewal has been properly filed with the NPDES permitting authority, or (3) the NPDES permitting authority has otherwise authorized the discharge.

To the extent that the regulatory authority is aware that a permit applicant, anyone owned or controlled by the permit applicant, or anyone who owns or controls the permit applicant is responsible for an unabated NPDES violation, require submission of proof that the violation either has been or is in the process of being corrected to the satisfaction of the NPDES permitting authority as a prerequisite for issuance of the SMCRA permit.

Ensure that the surface water monitoring plan approved under SMCRA is adequate to monitor compliance with all effluent limitations set forth in 40 CFR Part 434 and consistent with point-source discharge monitoring requirements established by the NPDES permitting authority.

(Enclosure in Letter dated April 18, 1995, from Acting Assistant Director, ESC, OSM, to Galloway and Morris at 1-2.) Thus, the required predicate for notification of the State is shown by the record to have existed contemporaneous with the issuance of the letter on informal review.

That letter, however, issued no conclusion with respect to any request for TDN's in the four citizen's complaints. The letter concluded that the "complexity" of the issues, and the fact that they were of "major significance with respect to national policy on the implementation and enforcement of the Clean Water Act," justified a decision that "it would not be appropriate or equitable to initiate the inspection or enforcement process at this time regarding the specific sites you identify in your complaints."

We agree with OSM's articulation that the "fundamental issue to be decided in this appeal is whether OSM complied with the requirements of 30 U.S.C. ' 1271(a) and its implementing regulations in responding to the four citizens complaints at issue." (OSM Response to SOR at 5.) The threshold question for the Board, then, is whether either the "complexity" of the issues or the desire to a conduct "policy review and outreach" justifies a refusal to address the specific allegations of violations in the citizen's complaints.

We agree with appellants that the regulations do not permit OSM to defer responses to citizen's complaints "if the complaints establish 'reason to believe' that a violation exists." (SOR at 14.) When the information provided by appellants in their citizen's complaints provided OSM with reason to believe, that, if the proffered information were true, the enumerated permittees had violated the terms of their SMCRA permits, OSM's obligation was to respond to the citizen's complaint by issuing TDN's to the State for all of appellants' site-specific allegations. Plum Creek Mining Co., supra; Robert L. Clewell, supra; Donald St. Clair, supra. We see no basis for OSM's refusal even to address the question on informal review.

OSM cites nothing in the regulations, precedent, or the statute which provides a "complexity" exception to responding to citizen's complaints. OSM's response is to provide a lengthy and detailed description of OSM's thought and action process. OSM states:

OSM found it necessary to undertake a comprehensive effort to address the important issues raised in the citizens' complaints * * *. This process was initiated without delay with the forming of four teams of OSM personnel to conduct various aspects of the review. Among other tasks, the teams studied the language of relevant statutory and regulatory provisions, searched the legislative history of SMCRA and rules preambles for guidance, consulted with the [EPA] regarding interpretation and enforcement of the Clean Water Act, and conducted fact-finding to assess the accuracy of the information in the complaints. In recognition that the underlying issues have significant implications for all State and Federal Regulatory programs, OSM found it necessary to first examine the Federal requirements, the standards against which all state programs are measured, before it could evaluate West Virginia's handling of these issues.

* * * * *

Subsequent to the agency's review, the tentative policy determinations were circulated to the states and industry groups for their review and comment. Meetings were held with these groups in July, 1995, and by late October, all written comments were received and meeting notes summarized. Subsequently, OSM has been working to refine its positions * * *.

(OSM Response at 6-7.)

This narrative fails to show that OSM followed agency regulations. The actions OSM describes relate to complainants' requests for programmatic action, but bear no relation to the regulations at 30 C.F.R. ' ' 842.11 and 842.12. Rather, OSM appears to describe activities undertaken by OSM under 30 C.F.R. Part 733 to determine whether to substitute Federal enforcement for State programs. The regulation at 30 C.F.R. ' 733.12 is entitled "Procedures for substituting Federal enforcement of State programs or withdrawing approval of State programs," and subsection (a)(2) provides that "[a]ny interested person may request the Director to evaluate a State Program." Indeed, appellants sought such relief in the four citizen's complaints. We do not question OSM's approach to those programmatic issues, and this appeal involves no challenge to OSM for undertaking this policy review. Nonetheless, the pendency of a request for programmatic relief does not excuse OSM from acting independently on inspection requests submitted pursuant to the procedures of 30 C.F.R. ' ' 842.11 and 842.12, which require OSM to issue TDN's -- or at least to decide whether to do so based

on the regulatory factor of whether there was "reason to believe" a possible violation might exist. See generally Donald St. Clair, 77 IBLA at 293-95, 90 I.D. at 501-502. Although appellants initially suggested that action on the specific complaints could be delayed if OSM would pursue their complaints in accordance with an agreed schedule, OSM declined this offer. At that point, OSM had no choice but to follow its regulations with respect to the inspection requests.

OSM asserts that it "has not ignored the citizen complaint response requirements." (OSM Response at 8.) Yet, OSM's discussion of its "policy review" fails to identify any means by which OSM attempted to follow them.

The citizen's complaint response requirements do not call for "policy review" by OSM, and they do not invite action by joint industry/government task forces before OSM decides whether to act. And we agree with appellants that the regulations do not envision "fact-finding" to determine if a violation exists before deciding whether a "possible" violation may exist. Rather, the preamble language to the 1982 rule makes clear that the possibility of a violation triggers the regulatory requirements to notify the State: "This language * * * found in section 521(a)(1) of the Act * * * does not require OSM to conduct an inquiry into the veracity of the complainant." 47 Fed. Reg. 35627-28 (Aug. 16, 1982). We agree with appellants' assertion that, pursuant to 30 C.F.R. ' 842.12, the "factual investigation of a citizen's complaint follows, rather than precedes, issuance of the ten-day notice to state regulators." (SOR at 15.) In Plum Creek Mining Co., supra at 328, this Board stated:

When, based on available information (including information obtained from any person) OSM has reason to believe that a permittee is violating a State regulatory provision, it must issue a TDN to the State. See 30 U.S.C. ' 1271(a) (1994); 30 C.F.R. ' 842.11(b)(1)(ii)(B)(1). Unless the State, within 10 days of receiving the TDN, takes "appropriate action" to cause the violation to be corrected or shows "good cause" for failure to do so, OSM is required to immediately inspect the surface coal mining operation. See 30 U.S.C. ' 1271(a) (1994); 30 C.F.R. ' 842.11(b)(1).

The record reveals that, rather than follow its regulations at Part 842, OSM substituted the Part 733 process for it, and asks the Board to endorse that practice. While the record demonstrates a sound justification for OSM's belief that the programmatic relief was complainants' central concern, we do not find any basis for doing this. OSM had no discretion to ignore the site-specific allegations in favor of a full-scale policy review with affected industry members and the State.

Finally, OSM's reliance on SMCRA section 521(b), 30 U.S.C. ' 1271(b) (1994), which governs "inadequate State enforcement," does not adequately

justify its failure to review site-specific complaints under its regulations. OSM cites preamble language construing the section:

Section 521(b) * * * includes the proviso, however, that where a permittee has met his obligations under a state permit that was not willfully secured through fraud or collusion, he will be given a reasonable time to "conform ongoing operations to the requirements of this Act before suspending or revoking the State permit."

(OSM Response to SOR at 9-10, quoting 53 Fed. Reg. 26729.) From this, OSM reasons that if a citizen's complaint derives from "programmatic problems," then it can refrain from taking enforcement action until the programmatic problem is resolved. (OSM Response to SOR at 10.) OSM asserts that "if OSM's review of the allegations shows that no violation of the State program exists, but that the state program does not accord with the Act, [the] situation would require amendment of the state program before enforcement action is taken." Id.

OSM misconstrues the language of section 521(b) to cover all of the requests for TDN's. The preamble and OSM's discussion answer the question of what may happen if a State program does not accord with SMCRA. Nothing in the section or the preamble addresses the issue presented here of whether OSM can properly defer consideration of site-specific citizen's complaints alleging violations of the State program while it undertakes a policy review of that program. Rather, by its own description, the agency was in the process of reviewing the requirements of the Federal and State program; nothing in section 521(b) or the preamble language above allows OSM to ignore site-specific complaints alleging State program violations while it considers broader questions regarding the adequacy of the State program.

Thus, while it was undertaking to look at West Virginia program requirements and whether they complied with SMCRA, OSM was obligated to consider independently the site-specific complaints, instead of deferring that obligation to determine whether they constituted "reason to believe" a violation existed. The Memorandum attached to the ESC Letter suggests that, in April 1995, OSM would have concluded that some allegations did so. ^{10/} Moreover, while we understand that requiring the analysis under 30 C.F.R. Part 842 prior to consideration of whether the violations alleged are actually violations of the State program requirements may conceptually appear to put the cart before the horse in the context of a set of

^{10/} We are not unaware that the sheer number of complaints presented was so great as to make compliance by OSM and the State within regulatory time limits virtually impossible. However, had appellants presented a single site-specific complaint, it can easily be seen that broader policy review would not have precluded OSM's consideration of whether the site-specific complaint constituted "reason to believe" a violation existed. This does not change with the numbers of alleged violations under OSM's regulations.

complaints as broad as the ones at issue, we are not persuaded to change the outcome for two reasons. First, this is the scheme OSM chose in its regulations. Second, consideration by OSM of these questions in case-by-case fact-specific contexts, such as those presented by appellants in their citizen's complaints, might have produced a timely and responsive decision on the questions of whether a particular class of violation constituted a violation of the State program that could have assisted in OSM's subsequent policy review. ^{11/} Accordingly, we find that the Assistant Director's decision on informal review was incorrect in finding that the CHFO could defer reviewing the site-specific allegations to determine whether there was "reason to believe" that mine-specific violations existed.

II. This Board's Review Of OSM Actions Subsequent To The Appeal.

[2] Having concluded that OSM should have addressed the citizen's complaint issues, we now turn to the individual substantive questions of whether OSM erred in concluding, subsequent to its decision on informal review, that none of the allegations at issue here merits the identification of a potential violation of the West Virginia program requiring a TDN to the State. OSM eventually notified appellants, in the Response to the SOR and in its Supplemental Brief, that it did not believe that, as to the eight sets of allegations raised in the citizen's complaints which are subject to appeal here, appellants had shown reason to believe that any person was in violation of any requirement of SMCRA or any permit condition.

Our consideration is complicated by the fact that, although the appeal is taken from the April 27, 1995 decision, OSM rendered its conclusions regarding the site-specific allegations in pleadings subsequently and first filed with this Board. The well-settled, declared policy of the Department is that when an appeal is taken from the decision of one of its offices, that office loses jurisdiction over the matter. Jurisdiction is restored by final disposition of the appeal by the appellate body. Gateway Coal Co. v. OSM, 84 IBLA 371, 374-75 (1985); Utah Power & Light Co., 14 IBLA 372 (1974); Audrey I. Cutting, 66 I.D. 348 (1959). This policy was extended to cases involving appeals from decisions issued by OSM in one of the earliest cases decided by the Interior Board of Surface Mining Appeals. See Apache Mining Co., 1 IBSMA 14, 85 I.D. 395 (1978). ^{12/} In this case, appellants filed a timely appeal of

^{11/} We note that OSM never directly answered these questions in response to the citizen's complaints; OSM's answer appears first as argument in OSM's Response and Supplemental Briefs, and as part of a policy approach. This answer of counsel diverges from the initial but tentative conclusions of agency personnel.

^{12/} Secretarial Order No. 3092 of Apr. 26, 1983, 48 Fed. Reg. 22370 (May 18, 1983), transferred to the Board of Land Appeals "[a]ll of the functions and responsibilities delegated to the Board of Surface Mining and Reclamation Appeals with respect to appeals arising under the Surface Mining Control and Reclamation Act of 1977."

OSM's April 27, 1995, decision on informal review, conducted pursuant to 30 C.F.R. ' 842.15. Thus, as a technical matter, OSM had no jurisdiction to act with respect to the issues raised on appeal -- that is, those issues raised under 30 C.F.R. Part 842.

Nonetheless, OSM continued thereafter to analyze, clarify, and explore policy changes pursuant to the allegations raised by appellants and to report its findings and conclusions to appellants, in the course of its continuing policy and program analysis under 30 C.F.R. Part 733. This review was clearly appropriate. It also led to OSM's conclusions with respect to the site-specific allegations which its attorneys reported in pleadings to the Board. Normally, we would remand these issues to OSM to recover jurisdiction of the site-specific questions and properly adopt and render conclusions. At that point, appellants could appeal any adverse conclusions and the parties could brief the issues.

However, this appeal already contains a clear statement by OSM of its conclusions on each topic, as well as full briefing by the parties, and this appeal has been ripe for more than two years since appellants' Reply Brief was filed on October 31, 1997. No purpose would be served by forcing the parties through a jurisdictional maze to locate the point where the arguments already lie. Accordingly, we will exercise the de novo authority of the Board to consider whether the Secretary should adopt, reverse or amend the conclusions OSM articulates in its briefing with respect to each of the alleged violations. See 43 C.F.R. ' 4.1; Mabel M. Sherwood, 130 IBLA 249, 254 (1994); Taylor Basin Partnership, 116 IBLA 23, 25 (1990), dismissed, Aztec Basin Partnership v. Lujan, Civ. No. 90-CV-0304-B (D. Wyo., Apr. 12, 1991); Robert C. LeFaivre, 95 IBLA 26 (1986). We note, however, that had OSM properly considered the site-specific allegations in direct response to the citizen's complaints, and included its conclusions in the decision on informal review, this jurisdictional dilemma would have been avoided.

III. Appellants' Eight Categories of Site-Specific Complaints.

As noted above, the appellants argue that OSM erred in its consideration of eight categories of site-specific allegations. As to each of these allegations, the appellants allege that their information presented reason to believe in the existence of a violation of the State or Federal standards. We address each category, not in the order identified in appellants' request for relief in its SOR, but rather in the order of significance indicated by appellants' actual briefing of the six issues directly addressed in SOR argument.

A. "Failure of state and federal regulatory agencies to take enforcement action for violations of the monthly average effluent standards." In Citizen's Complaint CC-95-110-06, appellants provided information regarding eleven permittees who were routinely submitting sworn reports of noncompliance with monthly average effluent guidelines.

(Citizen's Complaint CC-95-110-06 at 8-11.) Appellants claim that these "self-reported" monthly effluent violations constitute a violation of the West Virginia State Program regulation at ' 38-2-14.5(b), and Federal regulations at 30 C.F.R. ' ' 816.42 and 817.42. The Federal regulations state:

Discharges of water from areas disturbed by surface mining activities shall be made in compliance with all applicable State and Federal water quality laws and regulations and with the effluent limitations for coal mining promulgated by the U.S. Environmental Protection Agency set forth in 40 CFR 434.

30 C.F.R. ' 816.42. Section 817.42 applies the identical requirements for underground mining activities. The West Virginia program rule states: "Discharge from areas disturbed by surface mining shall not violate effluent limitations or cause a violation of applicable water quality standards. The monitoring frequency and effluent limitations shall be governed by the standards set forth in an NPDES permit * * *." W.Va. Reg. ' 38-2-14.5(b).

Appellants argue that OSM and the State are required to take enforcement action based on permittees' self-reported sworn statements of noncompliance with effluent limitations imposed by these regulations. They cite (SOR at 20) the preamble to the permanent hydrologic protection regulations which state, in pertinent part, that "[c]ompliance with NPDES standards is part of the terms and conditions of a SMCRA permit. Noncompliance with any term or condition of a permit requires prompt notification of the regulatory authority." See 48 Fed. Reg. 43979 (Sept. 26, 1983).

As we understand OSM's logic, it construes its regulations at 30 C.F.R. ' ' 816.41(e)(2) and 817.41(e)(2) to establish a violation in a self-monitoring report only if the permittee fails to correct a self-discovered deviance from an NPDES requirement. 13/ Those sections provide:

Surface-water monitoring data shall be submitted every 3 months to the regulatory authority * * *. When the analysis

13/ Initially, OSM took the position that "while self-reported violations provide reason to believe that a violation exists, before OSM will issue a notice of violation, the violation must be observed by an inspector on the site." (OSM Response to SOR at 11.) Subsequently, however, OSM stated that it "will issue TDNs in response to the petitioners' allegations of monthly average effluent violations, where the data provides reason to believe that such violations exist." Id. at 12. In its Supplemental Brief, OSM appears to take the position that neither OSM nor the State agency has the authority to implement the CWA or the NPDES system. (OSM Supplemental Brief at 6.) Conversely, it states that its regulations establish that NPDES permit violations can be SMCRA violations in limited circumstances. (OSM Supplemental Brief at 7-8.) OSM's explanation that, over time, its position has "evolved," is a careful admission of this lack of consistency within its position.

of any surface-water sample indicates noncompliance with the permit conditions, the operator shall promptly notify the regulatory authority and immediately take the actions provided for in ' ' 773.17(e) and 784.14(g) [or 780.21(h) for surface mining operations] of this chapter. The reporting requirements of this paragraph do not exempt the operator from meeting any [NPDES] reporting requirements.

The referenced sections, 773.17(e) and 784.14(g), require "immediate implementation of measures necessary to comply" (30 C.F.R. ' 773.17(e)(2)), and compliance with a "hydrologic reclamation plan" for the site. 30 C.F.R. ' 784.14(g) or 780.21(h). Thus, OSM argues that whether or not the CWA establishes noncompliance with an NPDES permit as a violation of that statute, OSM's self-monitoring regulations establish a violation of SMCRA if a permittee either fails to report a deviance from monthly average requirements or fails to correct a self-reported deviance. According to OSM, it is only this failure to correct that establishes "reason to believe" a violation exists:

In accordance with the function of the reporting requirement, OSM interprets this preamble excerpt [describing 30 C.F.R. ' ' 816/817.41(e)] as meaning that, for all point sources included in the SMCRA surface water monitoring plan, the permittee must promptly report any violation of an NPDES effluent limitation to the SMCRA regulatory authority. Failure to do so would be a SMCRA violation subject to SMCRA enforcement sanctions and procedures, as would the failure to immediately take the corrective measures specified in the permit and hydrologic reclamation plan.

Thus, OSM interprets 30 C.F.R. ' ' 816/817.41(e)(2) to require the operator promptly to notify the SMCRA regulatory authority and take appropriate corrective action whenever the analysis of any sample collected under the SMCRA surface water monitoring plan indicates a noncompliance with applicable effluent limitations for the parameters listed in 40 CFR Part 434. Failure to report the noncompliance promptly, or to immediately take the steps necessary to correct the situation that caused the discharge to exceed effluent limitations, are enforceable violations under SMCRA. Therefore, although the regulations do not provide for the issuance of enforcement actions on the basis of self-reported noncompliances, they require remediation of the circumstances that caused the noncompliance.

(OSM Supplemental Brief at 7-8 (emphasis added).)

Thus, OSM's position is that the regulations at 30 C.F.R. ' ' 816.42 and 817.42 -- which establish that discharges must be in compliance -- "do not provide for the issuance of enforcement actions on the basis of

self-reported noncompliances" when the fact of the noncompliance appears in the context of self-monitoring reports under 30 C.F.R. ' ' 816.41(e)(2) or 817.41(e)(2). We presume from this that OSM would agree that a disclosure of noncompliance from some other source besides the self-monitoring report would constitute "reason to believe" a violation of 30 C.F.R. ' ' 816.42 or 817.42 exists. Otherwise, 30 C.F.R. ' ' 816.42 and 817.42 would have no meaning in the context of the rules at 30 C.F.R. Part 842, which provide that individuals may report situations of noncompliance.

Appellants argue that there is no exception for self-monitoring reports in the requirement that OSM should find "reason to believe" a violation exists and take enforcement action if an effluent requirement is ever exceeded. (Appellants' Reply at 23-24.) They state: "[N]either State regulators nor OSM may ignore an NPDES violation, regardless of whether an operator has reported it promptly and claims to have taken effective remedial action." *Id.* at 24. Thus, as we understand appellants' argument, even if knowledge of an effluent limit violation occurs in a self-monitoring report, and even if the company takes "effective remedial action," a citizen's complaint based on the single monthly report justifies a TDN and a State cannot demonstrate "good cause" for failure to act, within the meaning of 30 C.F.R. ' ' 842.11(b)(1)(B)(1), based on the corrective action.

[3] We disagree. We can agree with appellants that there is some inconsistency in a regulatory scheme which establishes that an NPDES effluent violation is a violation of a permit and the State and Federal program, and at the same time provides that if the violation is self-discovered, it is not a violation until the permittee fails to correct. But this is what the regulatory scheme provides. We will not establish a per se rule that any time a citizen investigates a company and finds a self-monitoring report in violation of the permittee's permit, that the citizen can force an investigation into the permittee's effluent even after the permittee has corrected the problem. While the citizen's complaint rules give considerable power to the citizen, we believe that such a result is the opposite of what was intended in the self-monitoring rules. The point of that rule seems to be to compel the permittee to intermittently sample its effluent and correct any discrepancies between the result and the permit requirements, not to open itself to a citizen suit every time it self-monitors.

Thus, we agree with OSM and adopt its conclusion that the mere fact that individuals have self-reported monthly noncompliance is not "reason to believe" a violation exists, because under the self-reporting regulations, the company bears an obligation to correct the effluent discharge to meet its hydrologic plan. It is not until this obligation to correct is ignored that OSM has "reason to believe" that a violation of 30 C.F.R. ' ' 816.41(e)(2) or 817.41(e)(2) exists.

However, the next question is whether the information provided by appellants was sufficient to provide "reason to believe" that the companies were not correcting the situations leading to monthly noncompliance

reports, and, if so, whether OSM was justified in second-guessing that information with further study instead of promptly issuing a TDN. OSM appears to agree that the existence of repeated monthly reports from the same discharge point is tantamount to evidence that the requisite corrective action has not been successfully taken. "The information provided by the petitioners shows repeated instances of self-reported non-compliance from the same discharge points. Failing to correct repeated effluent exceedances is an indication that remediation measures were not instituted." (OSM Supplemental Brief at 8.)

Nonetheless, OSM goes on to conclude: "However, because the most recent data listed in the complaint is from 1994, i[t] was not known whether these exceedances continue to exist. OSM therefore considered it necessary to obtain more recent data on these operations." *Id.* at 8. OSM proceeded to conduct an investigation into whether self-reported effluent data for the period from May 1996 through March 1997 constituted "reason to believe" a violation existed. Based on this investigation OSM concluded that sufficient remedial action had taken place to prohibit such a finding. *Id.* at 9.

We agree with appellants that OSM's course of action bears little relation to its regulations. OSM's obligation was to look at the information supplied by the informant and make a judgment whether that information provided "reason to believe" a violation existed. The independent investigation of a different time period has no place in the regulatory scheme until such time as an enforcement action is underway. The subsequent investigation into 1996 and 1997 data post-dated a timely response to the citizen's complaint, under 30 C.F.R. ' 842.11, by a matter of years.

While, at first blush, it might appear that OSM's action to undertake contemporaneous investigation of a violation alleged years previously makes considerable sense, this approach makes sense only if it was reasonable for OSM to delay decision on the citizen's complaint for a matter of years in the first place. As we held above, it was not. Moreover, if we were to uphold OSM's actions on this point, then we would endorse an exception to the citizen's complaint regulations that would permit OSM to engage in a waiting game during which it could delay processing a citizen's complaint so long that the information provided by the complainant would no longer be timely. We find nothing in OSM's regulations to authorize such an exception to the agency's obligations to respond to a citizen's complaint.

Further, such agency delay followed by independent investigation of more recent facts leads to the sort of factual and procedural complexities reflected in this case record. Rather than taking the allegations in the citizen's complaint as true, OSM has investigated the topic years after the complaint, and presents conclusions based on purported information, which OSM does not submit, but which it claims justifies a refusal to issue a TDN. Appellants argue that none of this information is properly before the Board (Appellants' Reply at 24), and presents contradictory information, including the allegation that at least one company (G W Equipment Leasing, Inc.) has not reported any self-monitoring violations because it stopped

reporting altogether in violation of agency regulations. Id. at 26. The end result is that OSM and the complainants bicker before us about the meaning and accuracy of subsequent data while the question of whether the original complaint presented "reason to believe" a violation existed has never been addressed. We agree with the appellants, id. at 27, that "OSM has violated [almost] every principle governing the handling of citizen complaints in [the] process of responding to the Petitioners' allegations of 'monthly average' effluent limit violations." Accordingly, we find that OSM's subsequent investigation into self-reported compliance data did not amount to compliance with its obligations to respond to the data appellants submitted.

Unfortunately, this does not answer the question of what should happen at this juncture. It is 2000. The citizen's complaints were filed based on data from the early 1990's. OSM's subsequent investigation took place in 1996 and 1997, and the information supplied in response by appellants derives from 1997. We cannot even venture a guess about the parties' conflicting descriptions of the 1996-97 data because OSM has not presented that data. If we were to exercise the jurisdiction of the Secretary to compel OSM to issue TDN's on the basis of any of appellants' data, we would once again enter a maze only to arrive at the point at which we are now located. OSM could simply find that the State had shown good cause for failing to act because the data is no longer pertinent to the current state of affairs. Rather than force the parties through this exercise, we simply state that the legal conclusions rendered above apply to any citizen's complaint based upon self-monitoring reports filed by permittees. If appellants can now supply "reason to believe" a violation of agency regulations exists, OSM must take appropriate and timely action in response under its regulations, in accordance with the rulings here. 14/

B. "Failure of permittees to obtain or renew NPDES permits." One of appellants' citizen's complaints (Correspondence No. F-95-031-06), alleged at least 17 instances in which a surface coal mining and reclamation operation had a SMCRA permit and one or more point source discharges, but no valid NPDES permit. (Citizen's Complaint CC-95-110-06 at 3, 22.)

14/ In addition to seeking the relief just discussed, appellants also seek TDN's on the basis of the alleged "failure of permittees to perform the required monitoring of effluent discharges," and "failure of permittees to report or correct violations of effluent limitations." (SOR at 51 (numbers 2 and 3).) Neither appellants nor OSM presents argument on these two points separate from the arguments just discussed. Given the difficulties presented by this record and appellants' lack of direct, separate analysis in the SOR, we are unwilling to further decide these two points. To the extent these two allegations refer to a failure on the part of a permittee to "promptly notify the regulatory authority and immediately take the actions provided for in ' ' 773.17(e) and 784.14(g) [or 780.21(h) for surface mining operations] of this chapter," as required by the regulations at 30 C.F.R. ' ' 816.41(e)(2) and 817.41(e)(2), when a self-reported effluent violation is reported, we have already addressed that point above.

Citing 30 C.F.R. ' ' 816.42 and 817.42, appellants claim that their citation of SMCRA permittees' operating point source discharges without a current NPDES permit constituted "reason to believe" a violation of the State and Federal program exists. The Federal rule states:

Discharges of water from areas disturbed by surface mining activities shall be made in compliance with all applicable State and Federal water quality laws and regulations and with the effluent limitations for coal mining promulgated by the U.S. Environmental Protection Agency set forth in 40 CFR 434.

30 C.F.R. ' ' 816.42 and 817.42. Appellants cite W.Va. Reg. 38-2-14.5(b), which states that the "effluent limitations shall be governed by the standards set forth in an NPDES permit * * *."

[4] OSM's final response to this allegation appears in its 1997 supplemental brief. We understand OSM to have come to the position that a failure to obtain an NPDES permit is an enforceable violation of Federal and State program rules. (OSM Supplemental Brief at 10.) Thus, it appears that the parties should be in agreement that a citizen's complaint alleging that a permittee is operating a point source discharge without an NPDES would constitute "reason to believe" a violation exists.

But this does not end the matter. OSM concludes that "there can be no violation of SMCRA" on this issue because:

All of the sites * * * had their bonds forfeited or finally released before the complaint was filed. In both cases, there is no longer a SMCRA-based permit in place on the site against which a permit condition can be enforced. Moreover, in the case of bond forfeiture, the West Virginia NPDES authority does not consider an NPDES permit to be required. * * * [T]herefore, there can be no violation of SMCRA * * *.

Id. at 11.

We note, first, that OSM's assertion that all of the sites had their bonds forfeited or released before the complaint was filed is unsupported in the record. While it is true that the citizen's complaint asserts that this is the case with respect to eleven of the seventeen identified permits, it is silent with respect to six of them; OSM does not explain the basis for its conclusion with respect to these six permits. To the extent OSM may have undertaken another research project into a set of allegations that the parties agree as a threshold matter should have provided reason to believe a violation existed, such research was beyond OSM's obligations to respond to the citizen's complaint and does not constitute compliance with its obligations under 30 C.F.R. ' ' 842.11.

Second, OSM's reliance on bond forfeiture to justify taking no action on allegations that companies are operating point source discharges without NPDES permits is both factually and legally insufficient to explain its position. OSM's conclusion presumes that once a bond is released or forfeited, then either (1) as a factual matter, there can no longer be a point source discharge, or (2) as a legal matter, such a remaining discharge no longer requires an NPDES permit to be compliant with SMCRA. Neither presumption is sustainable.

As a factual matter, the complainants alleged that at least six permittees were conducting some sort of SMCRA operations with a point source discharge and no valid NPDES permit. Given the parties' and this Board's consensus that this would constitute "reason to believe" a SMCRA violation exists, OSM's obligation was to presume these facts as true in responding. 47 Fed. Reg. 35627-28 (Aug. 16, 1982); Robert L. Clewell, 123 IBLA at 259, 99 I.D. at 104; Donald St. Clair, 77 IBLA at 307, 90 I.D. at 509. To the extent OSM conducted further investigation to determine, as it alleges without support, that all of the bonds on the SMCRA permits were either forfeited or released, this research did not answer the next question of whether the complainants were right C did a point source discharge continue to operate on the site? We cannot presume that the answer to this question is negative from anything OSM has provided us. Indeed, the complaint alleges that the relevant operation was reclamation. (Citizen's Complaint CC-95-110-06 at 21 n.32.) Thus, we cannot and OSM could not have presumed that there was no longer a point source discharge.

[5] It follows that OSM's conclusion that there was nothing to enforce under SMCRA is strictly based on the legal effect of bond forfeiture. OSM's single-sentence legal conclusion is that in circumstances in which a bond has been released or forfeited, "there is no longer a SMCRA-based permit in place." (OSM Supplemental Brief at 11.) At least with respect to bond forfeiture, this position contravenes SMCRA, the reclamation regulations and the bond forfeiture regulations.

We start with the proposition that the fundamental purpose of a performance bond is to ensure reclamation of a statutorily covered operation. "The amount of the bond shall be sufficient to assure the completion of the reclamation plan if the work had to be performed by the regulatory authority in the event of forfeiture * * *." 30 U.S.C. ' 1259(a) (1994). Reclamation is a prerequisite of any permit; SMCRA refers to requirements for "[e]ach reclamation plan submitted as part of a permit application." 30 U.S.C. ' 1258(a) (1994). The reclamation plan must include "steps to be taken to comply with applicable air and water quality laws and regulations" and "such other requirements as the regulatory authority shall prescribe by regulations." 30 U.S.C. ' 1258(a)(9) and (14) (1994). Reclamation plans are required to conform to the "environmental protection performance standards of the regulatory program." 30 C.F.R. ' ' 780.18(a), 784.13(a). These standards presumably include the permanent program performance standards at 30 C.F.R. ' ' 816.42 and 817.42.

Bonds are forfeited to ensure that funds are available to "complete the reclamation plan * * * on the permit area." 30 C.F.R. ' 800.50(b)(2).

Further, "bond liability shall extend to the entire permit area under conditions of forfeiture." 30 C.F.R. ' 800.50(c). Thus, it is not at all clear that in every case the SMCRA permit evaporates with the bond. Moreover, the reclamation obligation is derived strictly from SMCRA, not the CWA. Attendant on the reclamation obligation, coming entirely from SMCRA and implementing State and Federal regulations, is the obligation of the SMCRA permitting authority to ensure that reclamation is conducted consistent with the permanent program performance standards, including the obligation to ensure hydrologic protection in 30 C.F.R. ' 816.42 and 817.42.

In Robert L. Clewell, 123 IBLA at 270-74, 99 I.D. at 110-12, we expressly rejected the notion that the enforcement obligations of OSM or a State agency ended with bond forfeiture. We held that if outstanding violations remain on a minesite, the operator is bankrupt, and forfeited reclamation bonds are insufficient to abate the violations, a State will not ordinarily be considered to have taken appropriate action or shown good cause for failure to do so under 30 U.S.C. ' 1271(a)(1) (1994), unless it is diligently pursuing or has exhausted all appropriate enforcement provisions of the State program and is taking action to ensure that the operator and its owners and principals will be precluded from receiving future permits while violations continue at the site.

As we stated in Innovative Development of Energy, Inc. v. OSM, 110 IBLA 119, 124 (1989):

Neither SMCRA nor Departmental regulations implementing SMCRA contains provisions which operate to release a minesite from regulation because a reclamation bond is forfeited. To the contrary, SMCRA provides that the miner shall be liable under the performance bond "for the duration of the surface coal mining and reclamation operation and for a period coincident with operator's responsibility for revegetation." 30 U.S.C. ' 1259(b) (1982). Nowhere in the Act is there any provision suggesting that the forfeiture of a reclamation performance bond creates a limitation upon Federal regulation of a minesite subject to the Act. * * * The regulation of a given site ends upon successful completion of the reclamation in accordance with the standards established by the Act and relevant rules. OSMRE v. Calvert & Marsh Coal Co., 95 IBLA 182 (1987); see 30 U.S.C. ' 1265(b)(10)(A)(ii) (1982).

Thus, OSM's unequivocal assertion that, in the case of bond forfeiture, "there can be no violation of SMCRA" if there is no NPDES permit is not consistent with the statute, regulations, and this precedent. Certainly, the reclamation plan is part of the permit application, and the purpose of bond forfeiture is to ensure the reclamation plan is completed. The authority to regulate the site remains until reclamation is completed.

It follows that OSM's comment that "there is no longer a SMCRA-based permit in place on the site against which a permit condition can be enforced" does not answer the question of whether an alleged lack of an NPDES permit on a bond forfeiture site should constitute "reason to believe" a violation exists. ^{15/} A bond forfeiture site is one subject to reclamation, which should proceed in accordance with a SMCRA approved reclamation plan. To comply with 30 C.F.R. ' ' 816.42 and 817.42, an NPDES permit would be anticipated for point source discharges. An alleged lack of an NPDES permit, we conclude, would constitute "reason to believe" the reclamation plan was not complied with by the company. OSM's arguments that "in the case of bond forfeiture, the West Virginia NPDES authority does not consider an NPDES permit to be required" and "there is no longer a SMCRA-based permit in place on the site" is the sort of information the State might have supplied as evidence of good cause for failure to act, particularly if there was something else to demonstrate compliance with the permanent program standards. However, it is not, as a stand-alone, unsupported comment in an OSM supplemental brief, sufficient basis upon which we can adopt OSM's conclusion that there was no "reason to believe" a violation existed in the case of bond forfeiture. ^{16/}

We see no reason in the statute, regulations, or policy, to construe bond forfeiture to have the effect of terminating OSM's obligation to review NPDES (or other) compliance issues at a site through the TDN process. Indeed, the point of bond forfeiture is to ensure that the approved reclamation plan is carried out consistent with the permanent program performance standards. If we were to adopt OSM's position, we would exempt bond forfeited sites from those SMCRA obligations, which would avoid accomplishing the purpose of the rules and statute.

[6] Our conclusion is different with respect to bond release. SMCRA makes clear that bonds can be released only when "all reclamation requirements of this chapter are fully met." 30 U.S.C. ' 1269(c)(3) (1994). Likewise, OSM regulations require proof "that all applicable reclamation activities have been accomplished in accordance with the requirements of the Act, the regulatory program and the approved reclamation plan" prior to bond release. 30 C.F.R. ' 800.40(a)(3). Thus, a company that has a released bond, at least in theory under the regulations, has completed reclamation and its failure to retain an NPDES permit after all reclamation activities are concluded would not normally

^{15/} We note that this statement is not substantiated by any record evidence or explanation as to why this would be true in every case of bond forfeiture. Nothing in OSM's bond forfeiture regulations equates forfeiture with permit revocation. See 30 C.F.R. ' 800.50.

^{16/} OSM does not provide any support for its assertion that West Virginia does not require NPDES permits to be required in the case of bond forfeiture (OSM Supplemental Brief at 11), or explain how it would be consistent with an approved reclamation plan for the State to abandon the reclamation plan requirements.

constitute "reason to believe" a violation exists. Something more by way of an alleged violation would be required. We are bolstered in this conclusion by the fact that appellants' arguments in reply relate only to bond forfeiture and not bond release. Accordingly, we adopt OSM's conclusion that an allegation that a bond release site has no valid NPDES permit in place does not, standing alone, constitute "reason to believe" a violation exists.

C. "Failure of state regulators to inspect all outfalls as a part of each complete inspection required by the approved state program and the Surface Mining Act." Complainants alleged that the State failed to conduct complete inspections as required by law. The Conservancy and NWF identified 15 permittees whose mines were allegedly inspected but at which all outfalls were not inspected. (Citizen's Complaint CC-95-110-06 at 16-18.) Appellants assert that OSM should have issued TDN's for each of these permittees because, according to appellants, State and Federal regulations specify that every inspection requires inspection of every outfall. (SOR at 47-49.)

Appellants are unable to cite a regulation which says this. While appellants cite 30 C.F.R. ' ' 816.42 and 817.42, neither rule mentions inspections or what constitutes all of the requirements of one. While appellants note that West Virginia regulation ' 38-2-20.1(a)(2) requires quarterly inspections, the allegation does not appear to challenge the frequency of inspections, and appellants do not seek any relief from this Board on that issue. See SOR at 49, 51 (number 5).

This leaves appellants with West Virginia regulation ' 38-2-20.1(c), which appears to largely duplicate the requirements of 30 C.F.R. ' 840.11(b). That Federal rule defines a "complete inspection" as an "on-site review of a person's compliance with all permit conditions and requirements imposed under the State program, within the entire area disturbed or affected by the surface coal mining and reclamation operations." Appellants apparently read this regulation's reference to "all permit conditions" as compelling in every case a full inspection of every outfall. We agree with OSM that the two are not necessarily the same and depend on a number of factual issues not before us on this record, including location of the outfalls in relation to water monitoring points.

Accordingly, we do not agree that an alleged lack of an inspection at all outfalls equates to "reason to believe" a violation exists, such that a TDN to any company would be required.

[7] Moreover, it is not clear that appellants' allegation is redressable in the context of a review of a citizen's complaint. If appellants allege that the effluent from a particular outfall is a violation, then the proper remedy is for OSM to issue a TDN, and conduct a Federal inspection if the State fails to inspect that outfall and take appropriate action or provide good cause for failing to do so. On the other hand, if the gravamen of appellants' complaint is that the State as a general matter is failing to carry out the "complete inspection" requirements of

its program by failing to inspect every outfall, that particular grievance would be cognizable under the Federal takeover provisions of 30 C.F.R. ' 733.12(a)(2) and would thus be beyond this Board's jurisdiction. See Donald St. Clair, 77 IBLA at 293-94, 99 I.D. at 501-502.

Although it may be argued that the State's failure to inspect every outfall may constitute a violation of the requirement for complete inspections imposed by 30 C.F.R. ' 842.11, the nature of the relief afforded by that provision makes it clear that it was not intended to redress this sort of "violation." The immediate remedy is a TDN and the ultimate remedy is a Federal inspection of the site and the issuance of a notice of violation if a violation is found. In the context of this argument, appellants do not allege that a particular outfall on a particular site is in violation but only offer a general allegation that the State is not inspecting every outfall. Therefore, they have not asserted "reason to believe" a violation exists at any particular outfall or that a TDN is appropriate with respect to any particular location. The only adequate remedy would be for OSM to take over, at least in part, enforcement in the State.

Thus, the allegation that the State failed to inspect every outfall is more properly regarded as raising an issue of whether OSM "has reason to believe that a State is not effectively implementing, administering, maintaining or enforcing any part of its approved State program" under 30 C.F.R. ' 773.12(b)(2), than an issue of whether a violation is occurring at a particular site under ' 842.11. The remedy arising under Part 733 is one that we ordinarily would not have authority to consider.

D. "Failure to block the issuance of new or significantly revised surface mining permits to entities linked to outstanding violations of the Clean Water Act." Citizen's complaint CC-95-110-05 identified permittees alleged to be in violation of the CWA and its implementing regulations. Appellants alleged that the State failed to block issuance of SMCRA permits to these permittees alleged to be in violation of the CWA and requested that OSM "conduct a federal inspection of the permits identified in this complaint to verify whether outstanding violations of the Clean Water Act exist at identified sites." In support of these assertions, complainants identified one permittee, Elk River Sewell, which allegedly had forfeited five bonds, was purportedly responsible for five minesites with both daily discharges and monthly average discharges in violation of the CWA, and was charged with "Outstanding Unabated Administrative Orders or Other Significant Non-Compliance." (Citizen's Complaint CC-95-110-05 at 10.) Complainants also identified eight permittees on minesites which allegedly had "both daily and monthly average discharges in violation of the CWA." (Citizen's Complaint CC-95-110-05 at 10-11.) 17/ Additionally,

17/ Appellants state that no administrative orders existed for these minesites "because the permittee[s] failed to file the required monthly reports identifying the violations. State records show beyond dispute that there are continuing violations of the CWA." (Citizen's Complaint CC-95-110-05 at 10.)

complainants listed and discussed nine permittees on eleven sites with allegedly outstanding or unabated CWA administrative orders or penalty notices or which had been referred to the EPA or to the West Virginia Attorney General "for Judicial Enforcement of Outstanding Monthly Average Violations." (Citizen's Complaint CC-95-110-05 at 11-13.) Appellants challenge OSM's failure to issue TDN's regarding these sites, and the State's alleged failure to block issuance of permits to these permittees.

We find both parties' arguments on this point to be unhelpful. Appellants' arguments consist of unsupported references to their "citizen complaints" and compel us to sort through mazes of pages without tables of contents to verify their claims to locate the source of their concern. Appellants are equally vague as to the exact procedure they believe should be followed, and raise once again (without arguing for) the possibility of TDN's issued to the State agency. OSM generally concedes that SMCRA, its regulations, and West Virginia's regulations, require permit blocking for chronic CWA violators but states that it is not required to issue TDN's because it does not trust the accuracy of the available data. Thus, presumably, OSM wishes to be excused from compliance with SMCRA because of its mistrust of data. We choose not to adopt OSM's position on this point for the simple reason that this Department may not disregard the statute while awaiting more compelling data.

[8] We start with the statute. Section 510(c) of SMCRA, 30 U.S.C. ' 1260(c), states:

Where * * * information available to the regulatory authority indicates that any surface coal mining operation owned or controlled by the applicant is currently in violation of this chapter or such other laws [of any department or agency in the United States pertaining to air or water environmental protection], the permit shall not be issued until the applicant submits proof that such violation has been corrected or is in the process of being corrected * * * and no permit shall be issued to an applicant after a finding by the regulatory authority, after opportunity for a hearing, that the applicant, or operator * * * controls or has controlled mining operations with a demonstrated pattern of willful violations of this chapter * * *.

(Emphasis added.) The regulations are consistent in that 30 C.F.R. ' 778.15 requires applicants to submit information in any permit application indicating any violation notices outstanding or received in the last three years, and requires the applicant to certify that any problem is corrected.

OSM agrees that SMCRA and State and Federal regulations require permit blocking for violations of the CWA. (OSM Response to SOR at 17.) However, it defends its decision not to issue TDN's to the State on grounds

that it cannot foresee a circumstance where it could implement that provision. OSM states: "[I]t is not the role of OSM to determine at what point a CWA violation becomes an unabated violation for purposes of permit blocking under SMCRA, or when such violation is corrected," noting that section 510(c) requires correction to the satisfaction of the water quality agency. Id. at 18. OSM goes on to state that it disagrees that SMCRA "requires OSM and SMCRA regulatory authorities to develop a system for gathering information on violations of other statutes, such as the CWA, but only to utilize any data that is made available by the [water quality] agency." Id. at 19. But OSM does not further explain how it implements SMCRA's permit block provision using this data. To the contrary, it asserts that the water quality agency's data is not good enough to use, even when made available. OSM explains the problems it sees with NPDES authorities and the fact that some or most do not issue written termination notices clarifying correction of a violation. Id. It states that "OSM has reservations about the accuracy and currency of the information contained in those [State agency] files." Id. While OSM presents various assertions why the data might never be good, it fails to provide a coherent picture of how it plans, when allegations of CWA violations are made, to affirmatively implement section 510(c).

[9] The complainants submitted data alleging a number of violations, as well as notices of violations of water quality requirements -- some more egregious than others -- and stated that West Virginia had failed to block issuance of permits to those companies. As we have held, OSM's obligation was to determine whether, if true, these facts constituted "reason to believe" a violation might exist, in this case of section 510(c). See generally Thomas L. Clewell, 123 IBLA at 273, 99 I.D. at 112. OSM concedes that violations of CWA requirements would justify permit blocking, and that failure to do so would violate section 510(c).

We fail to see how OSM needed more information to decide what to do. Instead of justifying its failure to issue TDN's, OSM's arguments provide compelling reasons for doing so. We do not see how the speculations and uncertain issues to which OSM alludes can ever be resolved unless and until the State responds to a TDN. The State may have provided good reasons for doing what it did not do, but we will never know that, because OSM chose instead to disparage the quality of the State water quality agency's data in general and dismiss that data which was presented directly to OSM by the complainants. This cannot possibly constitute compliance with 30 C.F.R. Part 842, and we accordingly reject OSM's position on this point.

Furthermore, the data is merely a predicate for an inspection request, not an enforcement action. In this context, complainants' data gave OSM a reason to believe that a violation is occurring, because the data, if true, would constitute a violation. See 30 C.F.R. ' 842.11(b)(2).

Accordingly, a TDN should have been issued to the State with respect to permittees alleged to be in violation of SMCRA, both by virtue of allegedly violating their permits and by allegedly operating under permits improperly granted. We note, however, that our decision falls short of concluding

that OSM should issue any TDN to the State for its alleged failure to properly manage its program to permit block in appropriate cases. The remedy for that complaint, for reasons stated above, falls under 30 C.F.R. Part 733.

For the reasons stated above regarding the timing of this decision, we remand the matter to OSM to allow complainants/appellants to submit a current list of situations in which they allege the State has failed to permit block despite documented violations of water quality requirements. OSM should respond to issue TDN's to the permittees operating in potential violation in accordance with this opinion and with its regulations.

E. "Failure to adjust site specific bonds and the State's special reclamation fund to cover the long term costs of chronic acid mine drainage." Citizen's complaint CC-95-110-02 (Citizen Correspondence No. F-95-031-02), identified minesites permitted to Phillipi Development (Permit No. 0-113-83) and Martinka Coal Company (Permit Nos. EM-125, R-746, R-747, 0-1001-87), as well as 22 permits issued to 15 additional companies, and asserted that there was "reason to believe" within the meaning of 30 C.F.R. ' 842.11(b)(2)

that even though the identified sites have chronic acid mine drainage and require treatment in order to meet applicable effluent and water quality standards, [West Virginia] has failed to require that either the site-specific bonds and/or the Special Reclamation fund be adjusted to cover long-term treatment costs in the event of forfeiture.

(Citizen's Complaint CC-95-110-02 at 2.) ^{18/} Appellants both acknowledge that OSM addressed the issue programmatically, and also waived any challenge to that action. (SOR at 32.) However, they assert that OSM should have issued TDN's to the State for its failure to adjust the bonds with respect to the specific companies identified above. Id.

OSM pointed out in its reply that it issued a final rule approving amendments to the West Virginia program, on October 4, 1995. (OSM Response to SOR at 16.) OSM's position is that this final rule states that West Virginia's alternative bonding system covers the obligation to adjust site specific bonds or the reclamation fund. Id. at 16-17, citing 60 Fed. Reg. 51907 (Oct. 4, 1995).

Appellants simply do not respond to the fact of this programmatic amendment or its significance. See Appellants' Reply at 9-11. They argue that "OSM's work on the programmatic aspects of the problem did not

^{18/} The complaint cites 22 additional permittees by name, mining permit numbers, and NPDES program numbers and asserts that West Virginia "has failed to adjust the bond in [these] cases to cover such [water treatment] costs in the event of forfeiture." (Citizen's Complaint F-95-110-02 at 9.)

affect the agency's duty to issue ten-day notices addressing the bonding violations," id. at 9, and request the Board to "require OSM to issue the required notices immediately." Id. at 11. This reiteration of its citizen's complaint and SOR, in light of a significant program change on the issue, is not sufficient to persuade us to explore the issue further. We have addressed OSM's obligations under 30 C.F.R. Part 842 above. But we will not exercise the Secretary's authority in this context to chastise OSM for failure to act on an issue which OSM argues is simply no longer relevant following the above-referenced program amendments, when appellants do not venture to explain why there should be disagreement on that point. Appellants have placed us in a position of investigating an issue on which they failed to preponderate; we will not further explore the issue. 19/

F. "Failure of the State to treat acid mine drainage at sites where West Virginia has forfeited a permittee's bond." In their first numbered citizen's complaint (CC 95-110-01), the complainants alleged that the State had failed to correct violations at bond forfeiture sites operated by three companies: Borgman Coal Company (Permit No. EM-32), ED-E Development Company Inc. (Permit No. S-10-81), Valley Mining Company (Permit No. S-64-83). There, and in the SOR, complainants/appellants argue that acid mine drainage and other violations were occurring at the three sites, and that the State bore the obligation to correct these violations using either the forfeited bond or monies in the State Reclamation Fund. (SOR at 40-42.)

We will not restate all of the legal arguments appellants make in support of their position that the State bears this responsibility (SOR at 40-47), because OSM does not dispute them. 20/ Rather, OSM's stated defense on this point is that the State is not a "person" within the meaning of section 521(a) of SMCRA, 30 U.S.C. ' 1271(a) (1994), and therefore the enforcement provisions of that section "are simply not applicable to this situation" (OSM Response to SOR at 20), and "this situation is not a proper subject for a TDN." Id. at 21.

[10] We cannot accept this position. Section 521(a) of SMCRA, 30 U.S.C. ' 1271(a) (1994), states that if "the Secretary has reason

19/ Once again, appellants imply that OSM should issue TDN's to the State agency in cases where appellants do not appear to seek TDN's against the permittees for noncompliance (in this case, acid mine drainage). Because of our ruling, we need not address this issue. However, to the extent appellants present evidence that would constitute "reason to believe" that acid mine drainage is occurring at one or all of the sites for which they claim bonding is insufficient, subject to the contours of decision in Part III.A above, OSM would be obligated to issue TDN's to the State with respect to those allegations with regard to those sites. This was not, however, the basis for appellants' request for relief.

20/ "OSM recognizes the deficiencies in West Virginia's handling of AMD at forfeited sites." (OSM Response to SOR at 21.)

to believe that any person is in violation of any requirement of this chapter," then enforcement will be taken according to its further provisions. (Emphasis added.) OSM's regulations at 30 C.F.R. ' 700.5 define "person" as including "any agency, unit or instrumentality of Federal, State or local government." OSM does not square this inconsistency or identify anything in the statute, its legislative history, or precedent which would justify the interpretation of "person" for purposes of interpreting section 521, to be different from its interpretation for all other purposes of SMCRA.

Although we cannot endorse OSM's view of the definition of the word "person," the regulation at 30 C.F.R. ' 842.11(b)(1)(i) does not depend on the word "person" or the identity of the perpetrator, but rather is triggered by the "existence" of a violation at a site. Accordingly, whether or not an entity of the State is a "person" within the meaning of 30 C.F.R. ' 700.5 does not answer the question of whether the State entity can be a violator within the meaning of 30 C.F.R. Part 842.

OSM's real concern appears to be that "there is simply no authority to permit OSM to take enforcement action against States where they have assumed responsibility for sites following bond forfeiture." (OSM Response to SOR at 20.) To the extent OSM means to suggest that, if the State is not acting in accordance with its approved State program, there is nothing OSM can do, this position is entirely unsubstantiated. OSM regulations at 30 C.F.R. Part 733 permit programmatic review. Further, a review of section 521(a) and (b) shows that OSM has authority with respect to particular sites. Subsection (a) provides authority for the Secretary to issue cessation notices with respect to a site if a Federal inspection reveals a violation. Subsection (b) provides authority for the Secretary to respond to inadequate State enforcement. Thus, OSM's apparent abnegation of its authority to take action when a citizen identifies a chronic pollution problem at a site is perplexing.

OSM may mean to argue that, under 30 C.F.R. ' 842.11, it cannot issue a TDN to a State based on the State's action or inaction, as if the State were a violator. We agree with what we believe to be OSM's position that the State is in the role of "enforcement" agency and not in the role of a "permittee" in the context of 30 C.F.R. ' 842.11. Thus, to the extent OSM means to argue that under that regulation, it cannot treat the State as a permittee, we agree.

However, this does not answer the question presented here. A citizen has alleged that acid mine drainage is occurring at several specific bond forfeiture sites, and asks for a TDN. OSM takes the position that, under 30 C.F.R. ' 842.11, it cannot issue a TDN with respect to a bond forfeiture site. We find nothing in the regulation itself which establishes such an exemption, and we find nothing in the statute or any regulation which would suggest that OSM has no enforcement remedy once a bond is forfeited. As noted above, this general position is refuted by the statute itself, good policy, and our precedent at Robert L. Clewell, 123 IBLA at 270-74, and Innovative Development of Energy, Inc. v. OSM, 110 IBLA at 124.

OSM's position appears to ignore that the regulations at 30 C.F.R. ' 842.11 anticipate a situation where a State may fail to show "good cause" for its failure to act. The regulations expressly provide that if OSM issues a TDN to the State regulatory agency and the State fails to take appropriate action within ten days, or to show good cause for failure to do so, OSM must conduct an inspection. 30 C.F.R. ' 842.11(b)(1)(ii)(B)(1). Thus, the regulations contemplate a situation where the State may fail to show good cause for a failure to take appropriate action with respect to a permit; the remedy is a Federal inspection and whatever enforcement is available after that inspection.

OSM appears to take the position that because it anticipates that the State has no "good cause" to assert for its alleged failure to correct the acid mining drainage at a bond forfeiture site, or else because it anticipates that there is good cause, there is no place for a citizen's complaint with respect to a bond forfeiture site. For the reasons just stated, we reject that proposition. If a citizen brings to OSM information constituting reason to believe a violation may exist at a bond forfeiture site, OSM must issue a TDN.

It is premature to guess at the many directions in which such a TDN might lead. The record does not contain enough information to understand (1) what options exist for the State vis-a-vis the permittee whose bond was forfeited, (2) what obligations the State has agreed to under the approved State program, (3) whether the bond forfeiture site is an abandoned site under 30 C.F.R. ' 840.11(g), or (4) whether a violation even exists. It may be that the TDN will lead to nought, other than consideration of the need for programmatic review under 30 C.F.R. Part 733. But, on the fundamental question of whether OSM must respond with a TDN to the State enforcement agency, when it has "reason to believe" a violation is occurring at a bond forfeiture site, we cannot find any basis in the regulations for excluding such sites from the process established in 30 C.F.R. ' 842.11(b).

IV. Alleged Errors in the Informal Review Process.

Appellants argue that OSM erred in permitting Assistant Director for Field Operations Allen Klein to adjudicate the decision on informal review because he was privy to and participated in early formulations of the agency's initial response to the four citizen's complaints. (SOR at 3, 50-51, 53.) Appellants claim that permitting Klein's involvement at the juncture of "informal review" "violated the principle that informal review must be conducted by a 'neutral person' who is not 'an immediate supervisor of the inspector whose actions are being reviewed.'" (SOR at 50, citing Hazel King, 96 IBLA 216, 236 (1987).)

We decline to consider this issue. A decision to vacate the decision of Assistant Director Klein, as appellants request (SOR at 53), on grounds that he had no authority to render the decision on informal review, would

have compelled us to refuse to consider appellants' substantive arguments.

We reject a course that would place this matter in procedural limbo after five years. Appellants' request for this relief is all the more perplexing in that it contradicts their request that we consider the substantive aspects of the decision on informal review. We deem it unnecessary to act upon this portion of appellants' petition as our decision has rendered it moot. This Board has declined to entertain appeals where the challenged action has already occurred and no effective relief can be afforded an appellant. See, e.g., Wildlife Damage Review, 131 IBLA 353 (1994).

Moreover, we do not find this case to present any exception to the rule of mootness. A well-recognized exception establishes that the Board will not dismiss an appeal on the grounds of mootness where the issues raised are "capable of repetition, yet evading review." In re Jamison Cove Fire Salvage Timber Sale, 114 IBLA 51, 53 (1990) (quoting Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 515 (1911)). Considering the complexity of this case and our ruling on the first issue above, OSM's compliance with this opinion would preclude repetition of the institutional response under review here. Nor is the issue evading review if, in the future, a party identifies procedural irregularities that justify consideration and vacatur -- they can request it of this Board. 21/

Appellants in reality appear to seek a ruling on the legal issues and an advisory opinion on the practice employed by OSM here to allow Klein to render the final decision. Appellants

ask the Board to make clear to OSM that future violations of the neutrality principle will be grounds for summary reversal of affected informal review decisions and that the Board will deem the adverse party in such cases entitled to an award of attorney fees for all the time reasonably spent on the case to the point of the Board's order vacating the informal review decision.

(SOR at 53.) We decline to do so.

21/ We also note that OSM replaced an organization structure promulgated Oct. 30, 1992 (release number 2961), with a new Regional Organization promulgated on Feb. 23, 1995. See 116 DM 5.1. The summary transmitting the new organization of OSM at 116 DM 1-5, identified by release number 3035 and also dated Feb. 23, 1995, proposes several organizational changes, one of which would be to "[a]bolish the Assistant Directorate for Field Operations." We do not have a clear picture of how the organizational structure today relates to that in existence when the original decisions were rendered in this case, nor will we speculate on how changes might bring about different procedures than those followed here.

Conclusion

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. ' 4.1, the decision appealed from is affirmed in part and reversed in part, and the case is remanded for appropriate action consistent with this opinion. 22/

Lisa Hemmer
Administrative Judge

I concur:

David L. Hughes
Administrative Judge

22/ On Apr. 20, 2000, while this decision was in the process of final editing, appellants submitted into this record a brief filed by the Secretary on Apr. 17, 2000, in Bragg v. Robertson, No. 99-2683 (4th Cir. docketed Dec. 17, 1999). According to appellants, the Secretary's position before the Fourth Circuit repudiates OSM's position in this case, taken in its Supplemental Brief at 4-5, regarding the intersection between the CWA and SMCRA. (Letter from Morris at 2.) However, on page 7 of OSM's Supplemental Brief, at 7, OSM conceded that violations of NPDES permits issued under the CWA can also be SMRCA violations. In any event, OSM's stated position before the Fourth Circuit is not inconsistent with this decision.